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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

INDEPENDENT U.S. TANKER OWNERS COMMITTEE, *et al.*,
Petitioners,

v.

SAMUEL K. SKINNER, SECRETARY OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Keystone Shipping Co.,
Sun Transport, Inc.

QUESTIONS PRESENTED

1. Where Congress has sought, by an appropriations limitation, to bar admission to the protected domestic trade of vessels built with construction subsidy under the Merchant Marine Act for the foreign trade—

> is the appropriations limitation to be given its Congressionally intended substantive effect permanently blocking the specified agency action, or is it to be given no effect where the agency rulemaking anticipated the ban by 19 days and the agency is deemed able to achieve the proscribed result without further expenditure?

2. Where, in order to maintain an American merchant fleet in foreign trade, the Merchant Marine Act directs the Maritime Administration to consider the applications of qualified citizens for operating subsidy, and authorizes subsidy calculated to render the ships competitive with foreign competitors—

> (a) in considering the application of vessels committed to the foreign trade to operate domestically, may the Maritime Administrator decline to consider subsidizing the ships in foreign trade on the ground that subsidy so measured would be "exorbitant" and would not "be sound policy"?
>
> (b) may the court of appeals, which discussed only the question of cost, and acknowledged that "One could argue that this cost is the price we should be ready to pay to achieve the explicit congressional objective", nonetheless sustain the result because it is for the agency to award subsidies, not the courts?

PARTIES TO THE PROCEEDING

Petitioners are Independent U.S. Tanker Owners Committee (an unincorporated association); Overseas Shipholding Group, Inc.; American Trading Transportation Company, Inc.; Cove Maritime Companies, Inc.; Falcon Carriers, Inc.; Keystone Shipping Company; and Sun Transport, Inc.* Other parties who appeared as appellees in the proceedings below are: Crest Tankers, Inc.; Trinidad Corporation; Victory Carriers, Inc.; Seatrain Tankers, Inc.; Richmond Tankers, Inc.; and Stuyvesant Tankers Corporation.

The respondents are Samuel K. Skinner, Secretary of Transportation; the U.S. Department of Transportation; the United States of America; the State of Alaska; American Petrofina, Inc.; SPC Shipping, Inc.; and Atlantic Richfield Co.

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* Parents and subsidiaries of petitioners (other than wholly owned subsidiaries) are: American Trading & Production Corp., parent company of American Trading Transportation Company, Inc.; Chas. Kurz & Co., Inc., parent company of Keystone Shipping Company; and Sun Company, Inc., parent company of Marine Investment Co. of Delaware, which in turn is the parent company of Sun Transport, Inc. The other petitioner corporations have no parent companies or non-wholly owned subsidiaries.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT	5
A. Legislative and Judicial Background	5
B. Proceedings Below	8
REASONS FOR GRANTING THE WRIT	9
I. The Appropriations Limitation	10
II. The Merchant Marine Act	15
CONCLUSION	21

TABLE OF AUTHORITIES

Cases Page

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 15
City of Los Angeles v. Adams, 556 F.2d 40 (D.C. Cir. 1977) 14
Independent U.S. Tanker Owners Committee v. Dole, 809 F.2d 847 (D.C. Cir.), *cert. denied*, 484 U.S. 819 (1987) 7
Independent U.S. Tanker Owners Committee v. Lewis, 690 F.2d 908 (D.C. Cir. 1982) 6
Motor Vehicle Manufacturers Assn. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29 (1983) 16, 18, 19
Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984) 12
Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572 (1980) 6, 15
United States v. Dickerson, 301 U.S. 554 (1940) 14
United States v. Darusmont, 449 U.S .292 (1981) 12
United States v. Sperry Corp., 110 S. Ct. 387 (1989) 12

Statutes

Merchant Marine Act, 1920

§ 27, 46 App. U.S.C. § 883 ..... 6, 15

Merchant Marine Act, 1936

§ 101, 46 App. U.S.C. § 1101 ..... 2, 3, 15, 17
Title V, 46 App. U.S.C. §§ 1151ff 15
§ 506, 46 App. U.S.C. § 1156 ..... 5, 12
Title VI, 46 App. U.S.C. §§ 1171ff 15
§ 601(a), 46 App. U.S.C. § 1171(a) 2, 3, 18, 19
§ 603(b), 46 App. U.S.C. § 1173(b) 2, 4, 17, 18
§ 604, 46 App. U.S.C. § 1174 19
§ 605, 46 App. U.S.C. § 1175 6

Supplemental Appropriations Act, 1987, Pub. L. 100-71, § 505, 101 Stat. 391, 471 (1987) 2, 8, 10, 11
Department of Transportation and Related Agencies Appropriations Act, 1984, Pub. L. 98-78, 97 Stat. 453, 472 (1983) 6

TABLE OF AUTHORITIES—Continued

Page

Department of Commerce and Related Agencies Appropriations Act, 1984, Pub. L. 98-166, 97 Stat. 1071, 1077 (1983) 6-7
Department of Commerce and Related Agencies Appropriations Act, 1985, Pub. L. 98-411, 98 Stat. 1545, 1551 (1984) 7
Dire Emergency Supplemental Appropriations and Transfers, Urgent Supplementals, and Correcting Enrollment Errors Act of 1989, Pub. L. 101-45, 103 Stat. 97 (1989) 13
Energy and Water Development Appropriations Act, 1990, Pub. L. 101-101, 103 Stat. 641 (1989) 13
Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. 101-121, 103 Stat. 701 (1989) 13
Treasury, Postal Service and General Government Appropriations Act, 1990, Pub. L. 101-136, 103 Stat. 783 (1989) 13
Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1990, Pub. L. 101-144, 103 Stat. 839 (1989) 14
Military Construction Appropriations Act, 1990, Pub. L. 101-148, 103 Stat. 920 (1989) 14
Rural Development, Agriculture, and Related Agencies Appropriations Act, 1990, Pub. L. 101-161, 103 Stat. 951 (1989) 14
Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub. L. 101-162, 103 Stat. 988 (1989) .. 14
Department of Transportation and Related Agencies Appropriations Act, 1990, Pub. L. 101-164, 103 Stat. 1069 (1989) 14
Department of Defense Appropriations Act, 1990, Pub. L. 101-165, 103 Stat. 1112 (1989) 14
Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1990, Pub. L. 101-166, 103 Stat. 1159 (1989) 14

TABLE OF AUTHORITIES—Continued

Page

Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1990, Pub. L. 101-167, 103 Stat. 1195 (1989) 14

Federal Regulations

46 C.F.R. § 276.3 (1987) 1

Other Authorities

S. Rep. 1721, 74th Cong., 2d Sess. (1936) (to accompany S. 3500) 19

Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 Duke L. J. 456 13

Maritime Administration, *Alaska North Slope Crude Distribution* (January 12, 1990) 16

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SAMUEL K. SKINNER, SECRETARY OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Independent U.S. Tanker Owners Committee, *et al.*, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 884 F.2d 587 (D.C. Cir. 1989). The district court's decision (Pet. App. 25a), Civ. Action Nos. 87-1685 & 87-2102, 1988 WL 48522 (D.D.C. Apr. 29, 1988), is not officially reported. The Maritime Administrator's rulemaking (Pet. App. 49a) appears at 52 Fed. Reg. 23522 (June 22, 1987) (final rule), codified at 46 C.F.R. § 276.3 (1987).

JURISDICTION

The opinion of the court of appeals was entered on August 22, 1989. Timely petitions for rehearing and suggestions for rehearing *en banc* were denied on November 2, 1989. Pet. App. 22a and 23a.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant federal statutes involved are § 505, Supplemental Appropriations Act, 1987, Pub. L. 100-71, 101 Stat. 391, 471 (1987), and §§ 101, 601(a), 603(b), Merchant Marine Act, 1936, 46 App. U.S.C. §§ 1101, 1171(a), 1173(b):

1. Supplemental Appropriations Act, 1987, Pub. L. 100-71, § 505, 101 Stat. 471 (1987):

   None of the funds appropriated or made available by this or any other Act or otherwise appropriated or made available to the Secretary of Transportation or the Maritime Administrator for purposes of administering the Merchant Marine Act, 1936, as amended (46 U.S.C. 1101 et seq.), shall be used by the United States Department of Transportation or the United States Maritime Administration to propose, promulgate, or implement any rule or regulation, or, with regard to vessels which repaid subsidy pursuant to the rule promulgated by the Secretary May 3, 1985 and vacated by Order of the U.S. Court of Appeals for the D.C. Circuit January 16, 1987, conduct any adjudicatory or other regulatory proceeding, execute or perform any contract, or participate in any judicial action with respect to the repayment of construction differential subsidy for the permanent release of vessels from the restrictions in section 506 of the Merchant Marine Act, 1936,

as amended: *Provided*, That such funds may be used to the extent such expenditure relates to a rule which conforms to statutory standards hereafter enacted by Congress.

2. Merchant Marine Act, 1936, § 101, 46 App. U.S.C. § 1101 (Supp. V 1987):

   It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States, insofar as may be practicable, (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel, and (e) supplemented by efficient facilities for shipbuilding and ship repair. It is declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine.

3. Merchant Marine Act, 1936, § 601(a), 46 App. U.S.C. § 1171(a) (Supp. V 1987):

   The Secretary of Transportation is authorized and directed to consider the application of any citizen of the United States for financial aid in the operation of a vessel or vessels, which are to be used in an essential service in the foreign commerce of the United States or in such service and in cruises authorized under section 1183 of this title. In this subchapter VI the term "essential service" means the operation of a vessel on a

service, route, or line described in section 1121(a) of this Appendix or in bulk cargo carrying service described in section 1121(b) of this Appendix. No such application shall be approved by the Secretary of Transportation unless he determines that (1) the operation of such vessel or vessels in an essential service is required to meet foreign-flag competition and to promote the foreign commerce of the United States except to the extent such vessels are to be operated on cruises authorized under section 1183 of this Appendix, and that such vessel or vessels were built in the United States, or have been documented under the laws of the United States not later than February 1, 1928, or actually ordered and under construction for the account of citizens of the United States prior to such date; (2) the applicant owns, or leases or can and will build or purchase, or lease, a vessel or vessels of the size, type, speed, and number, and with the proper equipment required to enable him to operate in an essential service, in such manner as may be necessary to meet competitive conditions, and to promote foreign commerce; (3) the applicant possesses the ability, experience, financial resources, and other qualifications necessary to enable him to conduct the proposed operations of the vessel or vessels as to meet competitive conditions and promote foreign commerce; (4) the granting of the aid applied for is necessary to place the proposed operations of the vessel or vessels on a parity with those of foreign competitors, and is reasonably calculated to carry out effectively the purposes and policy of this chapter. . . .

4. Merchant Marine Act, 1936, § 603(b), 46 App. U.S.C. § 1173(b) (Supp. V 1987):

Such contract shall provide, except as the parties should agree upon a lesser amount, that the amount of the operating-differential subsidy for the operation of vessels in an essential service

shall equal the excess of the subsidizable wage costs of the United States officers and crews, the fair and reasonable cost of insurance, subsistence of officers and crews on passenger vessels, as defined in section 1183 of this Appendix, maintenance, and repairs not compensated by insurance, incurred in the operation under United States registry of the vessel or vessels covered by the contract, over the estimated fair and reasonable cost of the same items of expense (after deducting therefrom any estimated increase in such items necessitated by features incorporated pursuant to the provisions of section 1151(b) of this Appendix) if such vessel or vessels were operated under the registry of a foreign country whose vessels are substantial competitors of the vessel or vessels covered by the contract: *Provided, however*, That the Secretary of Transportation may, with respect to any vessel in an essential bulk cargo carrying service as described in section 1121(b) of this Appendix, pay, in lieu of the operating-differential subsidy provided by this subsection (b), such sums as he shall determine to be necessary to make the cost of operating such vessel competitive with the cost of operating similar vessels under the registry of a foreign country. . . .

STATEMENT

A. *Legislative and Judicial Background*

In the Merchant Marine Act, 1936, 46 App. U.S.C. §§ 1101 *et seq.*, Congress authorized the Secretary of Transportation to provide construction and operating subsidies to assist American vessels to compete in foreign trade on terms of equal cost. Under the statutory scheme, owners of such subsidized vessels bind themselves contractually to operate exclusively in foreign trade, with narrow exceptions for limited operation in the protected domestic trade. 46 App. U.S.C. §§ 1156,

1175(a). The domestic trading restrictions serve the dual purposes of maintaining the presence of American vessels in the foreign trade while protecting the unsubsidized domestic fleet from displacement by subsidized vessels. No subsidy assistance is provided for the domestic trade, as § 27 of the Merchant Marine Act, 1920, 46 App. U.S.C. § 883, has long excluded foreign vessels from that trade.

For over a decade, the courts and Congress have struggled with the authority and standards under which the Secretary may accept repayment of construction-differential subsidy ("CDS") in exchange for permanent rescission of the vessel's domestic trading restrictions. No part of the Act directly addresses this issue. In *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 588 (1980), this Court held that "the Secretary's broad contracting powers and discretion to administer the Act" allow him to rescind the restrictions in appropriate cases upon repayment of the construction subsidy with interest.

The Maritime Administration thereupon issued a general rule establishing eligibility requirements for full CDS repayment, including a showing of specified "exceptional circumstances". Petitioner challenged the laxity of the standards, and in *Independent U.S. Tanker Owners Committee v. Lewis*, 690 F.2d 908 (D.C. Cir. 1982), the court of appeals vacated the 1980 rule and the first application granted thereunder, finding numerous substantive and procedural deficiencies.

In 1983 the Secretary then proposed a new rule, which would allow *any* subsidized vessel to make full CDS repayment during a one-year period. At this point, Congress stepped in to block further agency action. On three separate occasions Congress enacted appropriations riders to prevent the Secretary from adopting such a rule.[1]

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[1] Department of Transportation and Related Agencies Appropriations Act, Pub. L. 98-78, 97 Stat. 453, 472 (1983); Department of Commerce and Related Agencies Appropriations Act, Pub. L. 98-166,

The moment the last bar lapsed, however, the Secretary published the proposed rule in final form. Pursuant to this 1985 rule, the owners of three vessels repaid subsidy and received contract amendments rescinding the domestic trading restrictions.

Once again, the court of appeals vacated the agency's rule on the ground that it failed to reconcile proffered nonstatutory goals of promoting efficiency and competition with the express purposes of the Act. *Independent U.S. Tanker Owners Committee v. Dole*, 809 F.2d 847 (D.C. Cir.), *cert. denied*, 484 U.S. 819 (1987). The court stayed its mandate, however, for six months, until July 16, 1987, to permit the Secretary to undertake further proceedings.

Immediately thereafter, both Congress and the Maritime Administrator again confronted the issue of permanent CDS repayment. On March 11, 1987, the agency announced its intention to publish a new rule confirming the results of the 1985 rule, which had been to admit three vessels. Two weeks later, on March 25, the House Appropriations Committee reported H.R. 1827, a supplemental appropriations bill including the limitation at issue in this case, providing that no funds appropriated "by this or any other Act" may be used "to propose, promulgate, or implement" any rule regarding CDS repayment by any vessel, specifically including the same three vessels, until such time as Congress enacts statutory standards governing such repayment.

On April 15, 1987, the agency published its notice of proposed rulemaking. The House passed H.R. 1827, including the ban on CDS repayment, on April 23; the Senate version of the bill, which did not contain this

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97 Stat. 1071, 1077 (1983); Department of Commerce and Related Agencies Appropriations Act, Pub. L. 98-411, 98 Stat. 1545, 1551 (1984).

provision, passed on June 2. On June 22, while H.R. 1827 was before the conference committee, the agency published its proposed rule, purporting to make it effective immediately. Five days later, on June 27, the conference committee reported out H.R. 1827, with the CDS repayment ban included intact as § 505 of the bill. The conference bill was passed promptly by both Houses, and signed into law on July 11. Supplemental Appropriations Act, 1987, Pub. L. No. 100-71, § 505, 101 Stat. 391, 471 (1987).

B. *Proceedings Below*

Petitioners filed suit challenging the 1987 rule, basing jurisdiction under 28 U.S.C. §§ 1331, 1333, 1337, 1651, 2201-2202. On April 29, 1988, the district court granted their motions for summary judgment. The district court held, *inter alia*, that the rule was barred by Congress' appropriations limitation, § 505, and, in addition, that the rulemaking was arbitrary and capricious because the agency had failed to explain how the rule furthered the goals of the Act. Pet. App. 25a.

The court of appeals (Pet. App. 1a) reversed the district court. With regard to § 505, the panel held that the literal language of the statute addressed future expenditures only and therefore did not void a rule adopted 19 days before enactment. The panel further concluded that no further agency action was required to implement the 1987 rule, and therefore § 505 did not affect the status of the three vessels named in the 1987 rule and specifically referred to in § 505. The statement of the rule's basis and purpose was also found to be sufficient.

REASONS FOR GRANTING THE WRIT

This case presents important issues involving the responsibility of executive agencies and the courts to obey the will of Congress. For some time, Congress had—by appropriations legislation—prevented the Secretary of Transportation from allowing tanker vessels built for the foreign trade with construction-differential subsidy ("CDS") to repay the subsidy and enter the severely overtonnaged domestic oil trade. In 1987—again by appropriations legislation—Congress permanently barred such a rule, specifically designating as to be excluded from domestic trade the specific vessels the pending rule proposed to admit. However, the agency, knowing that the ban was coming, promulgated its rule, made it effective upon publication, and, after enactment of the ban, contended that the ban was ineffective because the rule was earlier in time and required no further expenditure to implement. Overruling the district court, the court below sustained this contention on the ground that "Restrictions on expenditures of appropriated funds are inherently prospective, and we have no authority to give them retroactive effect." Pet. App. 20a.

The issue is important because Congress is often faced with rapid developments to which it considers it can best respond through appropriations limitations.[2] In all such cases its substantive intention is to arrest the action of the agency, and the expenditure limitation is essentially formal. Here, Congress' intent was plainly to halt what it found to be an unwise policy decision of the Maritime Administrator. The court's concentration on the literal form of limitation ignores the statute's plain meaning and frustrates its dominant intent.

The case also presents an issue as to the agency's obligation not to substitute its own notions of "sound

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[2] As shown below, this mechanism, which dates back a century, has become a significant Congressional tool; in 1989, 173 such riders were adopted.

policy" for the express policies and goals of Congress embodied in the organic maritime statute. A major issue in the proceeding was whether the well-being of the merchant marine would be best served by turning the ships in question into the domestic trade with admittedly deleterious consequences or to help maintain them in foreign trade by granting them operating subsidy. The Merchant Marine Act expressly commands the Secretary to consider applications for such subsidy from qualified operators. Yet the agency allowed the tankers to abandon the foreign trade and enter the domestic market, declining the option of granting them operating subsidy to compete effectively in the trade for which they were built, on the grounds of alleged expense and "sound policy." The court below, while acknowledging the argument that "this cost is the price we should be ready to pay to achieve the explicit congressional objective . . ." Pet. App. 13a, again overruled the contrary conclusion of the district court, saying that the Secretary, and not the courts, "has been vested with the authority to determine when operational subsidies should be provided. . . ." Pet. App. 14a.

The issue is important (a) because agencies may not substitute their ideas of good policy for those of Congress, and (b) because courts should not sanction such substitutions on the ground that they do not make policy decisions: that, of course, is a truism, but courts are required to assure that the agencies give reasons for their policy decisions that are consonant with the statutes they are charged to enforce.

I. The Appropriations Limitation

Congress enacted § 505 to block any transfer of tonnage to domestic trade by agency rule, or otherwise, until it could settle proper standards in further legislation. It expressly extended this prohibition to the three ships that had been admitted under the invalidated 1985 rule,

and which it was aware would remain under the proposed 1987 rule.[3]

The blocking law was passed in the form of a limitation on the use of funds appropriated "by this or any other Act or otherwise appropriated or made available". The district court (Richey, J.) vacated the rule because "The agency's action was nothing more than an attempt to subvert the will of Congress, and thus, cannot stand." Pet. App. 29a.

The court of appeals reversed the district court precisely on the ground of the literal form of the act as a limitation on expenditure.[4] Since the agency had raced to utter the rule some days before the spending ban,[5] and thereby arguably finished spending,[6] the court held

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[3] ". . . or, with regard to vessels which repaid subsidy pursuant to the rule promulgated by the Secretary May 3, 1985 and vacated by Order of the United States Court of Appeals for the District of Columbia Circuit January 16, 1987, conduct any adjudicatory or other regulatory proceeding, execute or perform any contract, or participate in any judicial action with respect to the repayment of construction differential subsidy for the permanent release of vessels from the restrictions in § 506 of the Merchant Marine Act, 1936, as amended . . ." § 505, Pub. L. 100-71.

[4] "Although it refers to the ITOC II decision, section 505 applies to any CDS repayment arrangement, and it operates exclusively as a restriction on the *expenditure* of appropriated funds. Such a prohibition is inherently prospective as the language does not purport to reach expenditures already made. Moreover, the provision that no funds *'shall be'* used for the enumerated purposes speaks only to future expenditures." Pet. App. 19a.

[5] The court below noted that, "however unseemly a race to preempt congressional action may at times appear, we know of no principle that holds that the executive branch must stay its hand whenever it learns that the legislative branch may change the law." Pet. App. 16a. The question is not whether the agency should wait, but whether its actions should stand after Congress does in fact "change the law" and invalidates them.

[6] The conclusion of the court below that no further agency expenditure was needed to implement the rule is dubious. Section 505

it free of the statute. "Restrictions on expenditures of appropriated funds are inherently prospective, and we have no authority to give them retroactive effect." Pet. App. 20a.[7]

This literalism was deemed appropriate because of "Congress' decision to rely on the appropriations process to achieve its policy objectives." Pet. App. 20a. So strictly binding on Congress did the court consider the appropriations form that it declined to examine the legislative

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forbids the agency to "execute or perform any contract" affecting the vessels admitted under the previously invalidated 1985 rule. The statutory trading restrictions on subsidized vessels are contractual, as required by § 506, 46 App. U.S.C. § 1156. Their release is likewise matter of contract. In effectuating the 1985 rule, the agency executed amendments to the contracts of the vessels admitted that expressly recited the rule. When the rule was vacated by the court of appeals, the amendments were necessarily voided. New amendments implementing the 1987 rule had not been executed, nor could they now be.

[7] So far as the court's determination that section 505 had only future application may have rested on concerns respecting retroactivity, see Pet. App. 18a, 20a, this Court's decision in *United States v. Sperry Corp.*, 110 S. Ct. 387 (1989), is dispositive. Even if the reason for Congress' having been outraced by the agency did not fall within *United States v. Darusmont*, 449 U.S. 292, 296-297 (1981), and *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 731 (1984) ["short and limited periods required by the practicalities of producing national legislation"], cited in *Sperry*, 110 S. Ct. at 396, retroactive enactments are valid if rationally justified. *Id.* The same reason that prevailed in *Sperry* is fully applicable here: the three ships have been admitted into the domestic trade under standards certain to have been different from those that Congress may hereafter enact; they were allowed in of their own motion and upon mere repayment, and it is more than likely that any future statutory rule will lay down barriers more protective of the coastwise and foreign trades; otherwise Congress would not have disapproved the Secretary's previous rule or the Administrator's present rule. The owners of these ships will therefore have obtained a windfall of the same kind discerned by the Court in *Sperry*, and against which it held that "It is surely proper for Congress to legislate retrospectively". 110 S. Ct. at 396.

history to verify that in enacting § 505, Congress intended "to prevent MarAd from adopting the 1987 rule." To accomplish that result, not appropriations language but authorization language was deemed required: "Had the conferees wished to vacate the 1987 rule, they could have done so simply by ordering its revocation. As they did not, our task is to apply the language they agreed upon and that Congress enacted into law." Pet. App. 21a.

The issue is therefore whether courts and executive agencies must give effect to Congress' substantive policy choices expressed in appropriations legislation. For the problem is present in every appropriations rider. It is obvious that the substantive intention will always be to arrest the agency action and that the spending limitation is essentially formal.

Appropriations-based restrictions on agency action are often the only effective way to prevent the initiation of policies disapproved by Congress, especially when, as demonstrated in this case, there may simply be no time to enact substantive legislation. *See* Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 Duke L.J. 456, 461-65.

Congress has used limitation riders to enact substantive policy for over one hundred years, and with increasing frequency since the 1960s, Devins, *supra*, at 462-63 and nn. 34-35; in 1989, Congress adopted 173 such riders.[8]

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[8] Dire Emergency Supplemental Appropriations and Transfers, Urgent Supplementals, and Correcting Enrollment Errors Act of 1989, Pub. L. 101-45, §§ 501, 105, 301, 103 Stat. 97, 103, 121-23 (1989); Energy and Water Development Appropriations Act, 1990, Pub. L. 101-101, §§ 502, 505-507, 103 Stat. 641, 656, 666 (1989); Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. 101-121, §§ 109-114, 116, 302-304, 306-307, 311, 313, 103 Stat. 701, 720-22, 725-26, 731, 739, 741-43 (1989); Treasury, Postal Service and General Government Appropriations Act, 1990, Pub. L. 101-136, §§ 102, 23-24, 502-503, 505A, 506-514, 520, 528-529, 606, 608, 610-613, 618, 620-622, 103 Stat. 783, 789, 808, 811-22

However awkward they may sometimes seem for accomplishing Congressional policy objectives, such riders constitute duly enacted legislation: "There can be no doubt that Congress could suspend or repeal the authorization . . . and it could accomplish its purpose by an amendment to an appropriation bill, or otherwise." *United States v. Dickerson*, 310 U.S. 554, 555 (1940). As the court of appeals itself has recognized, a court is "bound to follow Congress' last word on the matter even in an appropriations law." *City of Los Angeles v. Adams*, 556 F.2d 40, 49 (D.C. Cir. 1977).

What this means is that although such laws take the form of merely prohibiting expenditure for given agency conduct, courts must recognize that the substantive intention is to block the conduct, and that the expenditure device must not be read so literally as to defeat the real Congressional intention.

(1989); Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1990, Pub. L. 101-144, §§ 505-508, 510, 512-514, 519, 103 Stat. 839, 843, 869-74 (1989); Military Construction Appropriations Act, 1990, Pub. L. 101-148, §§ 101, 107-113, 120, 124, 126, 103 Stat. 920, 923-26 (1989); Rural Development, Agriculture, and Related Agencies Appropriations Act, 1990, Pub. L. 101-161, §§ 617-618, 624, 626, 630-635, 639, 103 Stat. 951, 983-86 (1989); Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub. L. 101-162, §§ 103, 105, 205-206, 601, 606, 608, 610, 103 Stat. 988, 994, 1005, 1031-38 (1989); Department of Transportation and Related Agencies Appropriations Act, 1990, Pub. L. 101-164, §§ 306, 308, 313, 315-316, 318, 103 Stat. 1069, 1092-94 (1989); Department of Defense Appropriations Act, 1990, Pub. L. 101-165, §§ 9001, 9006, 9009, 9013-9016, 9020-9023, 9026-9029, 9036-9037, 9039, 9041, 9051, 9054-9055, 9067-9069, 9071, 9073, 9076, 9078, 9080-9081, 9090, 9092, 9116-9117, 103 Stat. 1112, 1129-57 (1989); Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1990, Pub. L. 101-166, §§ 102-104, 201-202, 204, 209, 214-215, 301, 303-306, 506, 509, 516, 519-520, 103 Stat. 1159, 1165-92 (1989); Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1990, Pub. L. 101-167, §§ 503, 506, 510-511, 513, 519-520, 525-526, 535, 537, 541-542, 546-548, 558, 103 Stat. 1195, 1217-38 (1989).

The court below ignored the plain intention of § 505 to arrest, pending study, the transfer of tonnage from foreign to domestic trade, specifically including the three vessels earlier admitted under an invalid rule, thereby nullifying its dominating objective.[9] The court's nullification of this dominating objective is especially inappropriate when, as here, abundant evidence exists that "Congress has directly spoken to the precise question at issue." *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). In such situations, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.*

II. The Merchant Marine Act

The Merchant Marine Act, 1936, declares the policy of the United States to foster the development and encourage the maintenance of a merchant marine sufficient to carry the nation's domestic waterborne commerce and a substantial portion of its waterborne foreign commerce. Section 101, 46 App. U.S.C. § 1101; *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572 (1980). The instruments provided for effectuating this policy are the cabotage laws for the domestic trade, § 27, Merchant Marine Act, 1920, 46 App. U.S.C. § 883, and construction and operating subsidies for the foreign trade, Titles V, VI, Merchant Marine Act, 1936, as amended, 46 App. U.S.C. §§ 1151 ff., 1171 ff.

In deciding whether to authorize entry into domestic trade of ships originally built with government subsidy

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[9] The court below speculated that "section 505 could well have been intended to guard against the possibility that the Department might change its mind and enter into repayment arrangements with additional CDS vessels." Pet. App. 19a-20a.

Congress undoubtedly aimed to preclude any form of repayment; but equally without doubt its particular objective was to strike down the rule the Administrator had actually proposed, which was limited to revalidating the ships that had repaid under the vacated 1985 rule.

for the foreign trade, the agency charged with administering these acts was required to consider the interests of both trades and to elect any alternative disposition less disturbing to them. *Compare Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 46-49 (1983). It was conceded that the proposal for domestic transfer would result in severe displacement of important operating tanker tonnage. The agency's conclusory statement was six ships, Pet. App. 61a, but its actual supporting figures in its Regulatory Impact Analysis showed twenty, amounting to almost one million deadweight tons. J.A. 1113, Table VI-1.[10]

More drastic, the government conceded below that, on the prices for domestic shipping that the agency predicted would result from the rule, the remaining fleet would suffer lost freights of $200 million a year, J.A. 1122, and the rate structure would be noncompensatory for every class of tonnage. Federal Motion for Summary Judgment in the District Court, page 7 note 7.[11]

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[10] This prediction, that the subsidized VLCCs would displace nearly 1.0 million dwt of ships ranging from 128,000 dwt down to the class below 55,000 dwt, has been borne out; but in addition, one ship of 188,000 dwt (B.T. ALASKA) and two ships each of 225,000 dwt (the BROOKLYN, one of the ships newly admitted under the rule, and the STUYVESANT, which has defaulted on its mortgage payments and been repossessed by the government) have been forced out. The total tonnage displaced is about 1.6 million dwt. The nonproprietary coastwise fleet, the relevant market, was estimated at 2.7 million dwt when the rule issued. J.A. 709-710.

[11] The three ships admitted under the rule were said by the agency to be suitable only for the long haul from Valdez to Panama, where Alaskan crude oil is transshipped for Gulf and Atlantic destinations. The agency greatly overestimated the amount of oil moving across Panama. It predicted 632,000 barrels a day for 1987; 585,000 for 1988; and 605,000 for 1989. J.A. 1129. Actual movements were respectively 579,000, 427,000 and 290,000 (adjusted to eliminate foreign-flag carryings). Maritime Administration, Alaska North Slope Crude Distribution (January 12, 1990). The difference in the 1989 figures, for instance, means a reduction in shipping demand of 1.5 million dwt for the Valdez-Panama leg, and of 2.1 million dwt

On the other hand, drawing these ships into the domestic trade further reduces the exiguous American tanker fleet engaged in the foreign trade, in which flag participation is far below the statutory standard of "a substantial part of the foreign commerce of the United States". Section 101, *supra.*

These consequences required the agency to consider reasonable alternatives to a rule that at once drains the foreign trade and inflicts severe overtonnaging upon the domestic trade. Such an alternative is found in § 603(b), 46 App. U.S.C. § 1173(b), which authorizes payment of operating subsidy for bulk carriers sufficient to render them competitive with vessels of foreign flag.[12] The ships in question were built with construction subsidy but have never received operating subsidy. Their difficulties in the foreign trade flowed directly from the condition that underlies the statutory subsidy policy, that their operating costs as American ships are too high to permit successful competition in the world market, especially in the acute shipping depression in which that market has struggled for a number of years, Pet. App. 42a, and from which it is only now beginning to emerge.

The whole problem before the agency would be obviated if it followed the explicit statutory plan. Given equalizing subsidy, the ships would remain in the foreign trade for which they were and are necessary and for which they were built, and the destructive consequences

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for the through movement from Valdez to the U.S. Gulf—the latter representing a drop in demand from 4.0 million dwt down to 1.9 million dwt.

[12] "That the Secretary of Transportation may, with respect to any vessel in an essential bulk cargo carrying service as described in section 1121(b) of this Appendix, pay, in lieu of the operating-differential subsidy provided by this subsection (b), such sums as he shall determine to be necessary to make the cost of operating such vessel competitive with the cost of operating similar vessels under the registry of a foreign country."

to the coastwise fleet of their displacement into the domestic trade would be avoided.

It is striking that the statute is mandatory. It *directs* the agency to consider applications for operating subsidy by qualified citizens. Section 601(a), 46 App. U.S.C. § 1171(a).[13] Here the agency declined to do so.

The Administrator gave these reasons for rejecting this alternative: the subsidy would be "exorbitant"; it would lead to "inefficient operation" with the United States underwriting profitability; and "such a massive open-ended subsidy could prove totally counterproductive" for the government's efforts to "remove other anticompetitive trade measures by our trading partners. The United States is neither required to make such expenditures nor would it be sound policy." Pet. App. 76a.

The agency's dismissal in a single paragraph of this outstandingly important statutory alternative is a compendium of factors "Congress has not intended it to consider". *State Farm*, 463 U.S. at 43.

The essence of the Act is to enable inherently high-cost American shipping to meet foreign competition by equalizing construction and operating costs. Section 603(b) authorizes payment of sums to make the operating costs of bulk-carrying vessels fully competitive with their foreign competitors.

The Administrator characterizes this as a "massive open-ended subsidy" and as "underwriting profitability" of "inefficient operation". Pet. App. 76a. Nothing justifies such a description: the statute contingently allows subsidy for costs in respect of which Americans may be

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[13] "The Secretary of Transportation is authorized and directed to consider the application of any citizen of the United States for financial aid in the operation of a vessel or vessels, which are to be used in an essential service in the foreign commerce of the Unted States . . . ."

at a disadvantage, but does not guarantee profitability.[14] But even if they were open to such criticisms, the Administrator cannot simply declare himself not bound "to make such expenditures nor would it be sound policy." Here the Administrator has announced his philosophical disagreement with the law he is charged to enforce. His reference to the "counterproductive" effect of shipping subsidies upon international trade relations, in which he has no statutory responsibility, is especially revealing. The specific purpose of operating subsidy is to compete with foreign shipping: according to § 601, it is not to be awarded unless it will do just that.[15] That it will do so can hardly therefore be a lawful reason for withholding it. In fact, far from withholding subsidy in order to induce foreign countries to do the same, § 604, 46 App. U.S.C. § 1174, authorizes additional subsidy to offset foreign subventions.

In *State Farm*, this Court said, 463 U.S. at 43: "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider . . . ." The dissenting opinion remarked that different administrations are entitled to reevaluate costs and benefits of programs and regulations, but "Of course, a new administration may not refuse

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[14] Indeed, Congress saw in the differential-subsidy system just the opposite: "It is the purpose of this bill to endeavor to place the American owner and operator of an American flag ship on a competitive parity with his foreign-flag competitor. 'Parity' carries with it no guarantee of profits, and if there are to be any profits, they must be made in competition with foreign shipping." S. Rep. 1721, 74th Cong., 2d Sess. (to accompany S. 3500) (1936) p. 7.

[15] Before approving an application, the Secretary must determine that the operation of the vessel "is required to meet foreign-flag competition"; that the vessels are suitable "to meet competitive conditions"; that the applicant possesses the qualifications "to meet competitive conditions"; and that "the granting of the aid applied for is necessary to place the proposed operations of the vessel or vessels on a parity with those of foreign competitors". § 601(a), 46 App. U.S.C. § 1171(a).

to enforce laws of which it does not approve, or to ignore statutory standards in carrying out its regulatory functions." 463 U.S. at 59 and note. That is what the Administrator has done here. It is a matter of record that no contract for construction or operating subsidy has been awarded since 1981. J.A. 700-01. That record is explained by the Administrator's statement here that subsidies cost too much and are not "sound policy".

The court of appeals discussed only the Administrator's assertion that it would cost too much to subsidize the three ships ($5 million a year for each). Itself remarking skeptically that "One could argue that this cost is the price we should be ready to pay to achieve the explicit congressional objective", the court fell back on the observation that the agency is vested with the authority to decide when to give subsidies, not the courts.

This misconceives the issue: it is not whether the agency has the authority to say no, but whether the reasons it gives for saying no are compatible with the statute it administers. The courts surely have power to make that judgment without feeling that they are being called upon to award subsidies. It is surely within their province to say that the Administrator's philosophical disapproval of the Merchant Marine Act is not a valid basis for refusing to carry it out.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 1990

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No. ———

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

INDEPENDENT U.S. TANKER OWNERS COMMITTEE, *et al.*,
Petitioners,

v.

SAMUEL K. SKINNER, SECRETARY OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TABLE OF CONTENTS

		Page
Appendix A:	Opinion of United States Court of Appeals for the District of Columbia Circuit, entered August 22, 1989	1a
Appendix B:	Order of the United States Court of Appeals for the District of Columbia Circuit, denying petitions for rehearing, entered November 2, 1989	22a
Appendix C:	Order of the United States Court of Appeals for the District of Columbia Circuit, denying suggestions for rehearing *en banc*, entered November 2, 1989	23a
Appendix D:	Opinion of the United States District Court for the District of Columbia, entered April 29, 1988	25a
Appendix E:	*Construction-Differential Subsidy Repayment, Final Rule,* Maritime Administration, Department of Transportation, 52 Fed. Reg. 23522 (June 22, 1987)	49a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 16, 1989 Decided August 22, 1989

No. 88-5313

INDEPENDENT U.S. TANKER OWNERS COMMITTEE, *et al.*

v.

SAMUEL K. SKINNER, in his capacity as Secretary of the United States Department of Transportation, *et al.*

AMERICAN PETROFINA, INCORPORATED,
Appellant

& consolidated case Nos. 88-5314, 88-5317, 88-5318
88-5319, 88-5320 & 88-5324

Appeals from the United States District Court
for the District of Columbia
(Civil Action Nos. 87-01685 & 87-02102)

Richard A. Olderman, Attorney, U.S. Department of Justice, with whom *John R. Bolton*, Assistant Attorney General at the time the brief was filed, *Jay B. Stephens*, U.S. Attorney, and *Leonard Schaitman*, Attorney, U.S.

Department of Justice, were on the brief, for federal appellants. *Michael Kimmel*, Attorney, U.S. Department of Justice, also entered an appearance for federal appellants in Nos. 88-5319 and 88-5320.

A. Stephen Hut, Jr., with whom *Patrick J. Carome*, *Raymond B. Ludwiszewski*, *Michael Joseph*, and *Thomas L. Mills* were on the brief, for appellants/intervenors Atlantic Richfield Co. and SPC Shipping, Inc.

Roy G. Bowman, *Richard H. Saltsman*, and *Daniel Joseph* were on the brief for appellant American Petrofina, Inc. *R. Bruce McLean* also entered an appearance for appellant American Petrofina, Inc.

William E. McDaniels and *Joseph A. Klausner*, with whom *Daniel P. Levitt*, *Allan A. Tuttle*, *Michael D. Esch*, *Robert J. Blackwell*, *Anne E. Mickey*, and *Kevin T. Baine* were on the joint brief, for appellees.

Robert H. Loeffler entered an appearance for State of Alaska, appellant in No. 88-5324 and appellee in No. 88-5313.

Before BUCKLEY and WILLIAMS, *Circuit Judges*, and GEORGE H. REVERCOMB,* *U.S. District Judge* for the District of Columbia.

Opinion for the court filed by *Circuit Judge* BUCKLEY.

BUCKLEY, *Circuit Judge*: Under the Merchant Marine Act, the Department of Transportation may provide construction subsidies to vessels, but the subsidized vessels, with certain exceptions, may not operate domestically. The rule under review reaffirms an earlier one that allowed three tankers to repay their construction subsidies in return for permission to ship domestically. The challenged rule was issued and made immediately effective

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* Sitting by designation pursuant to 28 U.S.C. § 292(a).

less than one month before Congress passed an appropriations rider that barred the use of appropriated funds to promulgate or implement such subsidy repayment agreements.

Appellee tanker owners argue that the rider renders the rule null and void both because Congress intended the rider to apply retroactively and because it prevents the Department's Maritime Administration from taking the further actions they claim to be necessary before the rule is fully implemented. Appellees also claim that the regulation is procedurally defective.

The district court accepted these arguments or variations of them and vacated the rule. We hold that Congress' appropriations rider applies prospectively only and does not reach the challenged rule because it is self-implementing. We also conclude that the procedural challenges are without merit. We therefore reverse.

I. Background

The Merchant Marine Act of 1936 ("Act"), 46 U.S.C. §§ 1101 *et seq.* (1982), was enacted, in part, to place American merchant vessels operating in foreign trade on a more equal footing with foreign-built and manned vessels. To this end, the Act authorizes the Secretary of Transportation ("Secretary") to subsidize construction costs for ships built in American shipyards on the condition that vessels receiving such subsidies "shall be operated exclusively in foreign trade, or on a round-the-world voyage." *Id.* §§ 1151 & 1156. Congress, however, made certain exceptions to this rule. For example, with the Secretary's approval, a vessel financed through a "construction-differential subsidy" ("CDS") may operate domestically for a maximum of six months per year provided that the vessel repays a *pro rata* share of the subsidy. *Id.* § 1156.

The agency with immediate administrative responsibility over the merchant marine is the Maritime Administration ("MarAd"). *See* 49 C.F.R. § 1.4(j)(1) (1987). MarAd was originally located within the Department of Commerce, but was transferred to the Department of Transportation ("DOT" or "Department") in August 1981. *See* 46 U.S.C. § 1601 (1982). Authority over specific aspects of the CDS program has been assigned to a three-member Maritime Subsidy Board located within MarAd. 49 C.F.R. § 1.4(k).

This case involves the latest in a series of attempts by successive administrations to permit certain very large crude oil carriers ("VLCCs") to repay their subsidies in return for permission to operate domestically full-time. These efforts were prompted, first, by a determination that the vessels could no longer compete in foreign commerce as a result of the world oversupply of tankers that had arisen since 1970, and second, by the need, following the completion of the Alaskan pipeline, for an increase in domestic tanker capacity to carry Alaskan oil to Panama where it is transshipped to Atlantic and Gulf Coast ports. *See* 52 Fed. Reg. 23,522.

Thus in the late 1970's, the Secretary of Commerce entered into subsidy repayment arrangements on a case-by-case basis. His authority to do so was challenged, and, in *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 597 (1980), the Supreme Court held "that the Act empowers the Secretary to approve full-repayment/permanent-release transactions."

On October 15, 1980, the Secretary of Commerce published and made immediately effective an interim rule that limited the full CDS repayment option to tankers over a certain weight and provided that the Secretary would only accept repayment in "exceptional circumstances" after a determination that the vessels had little prospect for viable employment in foreign trade over an

extended period. 45 Fed. Reg. 68,393, 68,394 (1980). On November 13, 1980, MarAd approved repayment for the VLCC BAY RIDGE. Shortly thereafter, the Independent U.S. Tanker Owners Committee ("ITOC") challenged the interim rule as well as the approval of the subsidy repayment by the BAY RIDGE. In *Independent U.S. Tanker Owners Committee v. Lewis*, 690 F.2d 908, 918-20 (D.C. Cir. 1982) (*"ITOC I"*), we upheld the challenge after finding that the agency had failed to provide an adequate "general statement of the [rule's] basis and purpose" as required by section 553(c) of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553(c). Nevertheless, we allowed the BAY RIDGE to continue operating in domestic commerce. *Id.* at 931.

Following *ITOC I*, the Secretary of Transportation, who had by then acquired jurisdiction over shipping matters, issued a new regulation providing that for a one-year period beginning June 6, 1985, any CDS tanker could enter into a repayment transaction. 50 Fed. Reg. 19,170, 19,178 (1985) ("1985 rule"). During this period, three additional VLCCs—the ARCO INDEPENDENCE, ARCO SPIRIT, and BROOKLYN—took advantage of the rule and repaid in excess of $100 million in subsidies and interest. *See* 52 Fed. Reg. 23,522, 23,524 (1987).

ITOC challenged the 1985 rule and, in *Independent U.S. Tanker Owners Committee v. Dole*, 809 F.2d 847, 854 (D.C. Cir. 1987) (*"ITOC II"*), we held that DOT had once again failed to provide an adequate statement of basis and purpose. We vacated the rule but withheld issuance of our mandate until July 16, 1987 "to avoid further disruptions in the domestic market [by permitting the VLCCs to continue in domestic commerce *pro tem*] and to allow the Secretary to undertake further proceedings to address the problems of the merchant marine trade." *Id.* at 855.

After our decisions in *ITOC II*, MarAd initiated an informal rulemaking and, on June 22, 1987, published the

final rule ("1987 rule") that is at issue here. The rule (in which the Secretary concurred) provides in pertinent part:

> The Maritime Administration reaffirms the allowance of the irreversible total repayment of unamortized construction-differential subsidy (CDS), with interest and rescission permanently of the domestic trading restrictions related to the grant of CDS for tankers of any deadweight tonnage for applications approved between June 6, 1985 and June 5, 1986, in accordance with the terms and conditions of paragraph (b) of this section [specifying methods of computing interest, etc.]. The approved applications were for the ARCO INDEPENDENCE, ARCO SPIRIT and BROOKLYN.

52 Fed. Reg. 23,522, 23,536 (June 22, 1987). The Secretary made the rule effective immediately upon publication, invoking the "good cause" exception to the thirty-day waiting period between issuance and effectiveness required by section 553(d) of the APA, 5 U.S.C. § 553(d) (1982). *Id.*

Meanwhile, Congress had begun work on a rider to an appropriations bill that was designed to bar CDS repayment arrangements. On July 11, 1987, the President signed the Supplemental Appropriations Act of 1987 ("Appropriations Act") which provides (at section 505) that none of the appropriated funds "shall be used to propose, promulgate, or implement any rule or regulation" with respect to the repayment of subsidies in order to relieve CDS vessels from their commitment to foreign commerce. Supplemental Appropriations Act, Pub. L. No. 100-71, § 505, 101 Stat. 471 (1987) ("section 505").

ITOC and certain tanker owners successfully challenged the 1987 rule in the U.S. District Court for the District of Columbia. The court ordered the rule vacated on a finding that Congress had intended to bar the prom-

ulgation of a CDS repayment rule after the date of our *ITOC II* decision, January 16, 1987. The court also concluded that it was improper for MarAd to issue the regulation when it knew that Congress was at work on section 505. Finally, the court found the regulation procedurally defective for two reasons: first, MarAd did not have good cause to waive the thirty-day waiting period; and second, the rule was arbitrary and capricious because the agency had failed to provide an adequate statement of its basis and purpose. *Independent U.S. Tanker Owners Committee v. Burnley*, Civ. Action Nos. 87-1685 & 87-2102 (D.D.C. Apr. 29, 1988) ("Mem. Op.").

Appellees reassert an additional claim not reached by the district court, namely, that MarAd had no authority to issue the rule because that responsibility had been delegated to the Maritime Subsidy Board. As appellees failed to present this objection during the rulemaking process, however, they are precluded from doing so at this time. *See National Sanitary Landfill, Inc. v. Thomas*, 849 F.2d 1516, 1521 (D.C. Cir. 1988), *cert. denied*, 109 S. Ct. 1528 (1989).

II. Discussion

A. Procedural Issues

We begin with a discussion of the procedural issues because if, as the district court found, the 1987 rule was invalid *ab initio*, we will not need to consider the effect of section 505 of the Appropriations Act.

1. *Waiver of Thirty-Day Waiting Period*

As an alternative ground for striking down the 1987 rule, the district court held that the agency had violated section 553(d) of the APA by failing to observe the statutorily mandated thirty-day waiting period between the date of the 1987 rule's publication and the date of its effectiveness. Mem. Op. at 22-25. Section 553(d) provides:

> The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—
>
> (1) a substantive rule which grants or recognizes as exemption or relieves a restriction;
>
> (2) interpretative rules and statements of policy; or
>
> (3) as otherwise provided by the agency for good cause found and published with the rule.

5 U.S.C. § 553(d) (1982).

In the notice accompanying the publication of the rule in the June 22, 1987 Federal Register, the Maritime Administrator invoked the "good cause" exception provided by subsection (d)(3) ("good cause exception") to the thirty-day waiting period required by section 553(d) by explaining that "[t]he rule must be made effective prior to the [*ITOC II*] imposed deadline of July 16, 1987 in order to avoid disruptions in the domestic trade." 52 Fed. Reg. at 23,536. The Administrator also stated that because the three ships affected by the rule had been operating in the domestic trade for more than a year, the public did not need time to prepare for their permanent entry into domestic service. *Id.* In the proceedings before the district court, the government also claimed exemption under subsection (d)(1) ("(d)(1) exception") which excepts a substantive rule that "relieves a restriction" because the 1987 rule lifted the ban on the three vessels' participation in domestic shipping.

The district court rejected the government's claim of a (d)(1) exception because it had not been asserted in the agency's published notice, characterizing it as a *post hoc* rationalization that an agency may not advance for the first time on appeal. Mem. Op. at 22-23. The court then dismissed the claim to a good cause exception on the ground that as the agency could and should have delayed the rule's effective date until July 15, one day prior to the expiration of the *ITOC II* stay, the agency had failed

to demonstrate good cause for the June 22 effective date. *Id.* at 23-25.

We need not determine whether the good cause exception is applicable in this instance because we find that the agency's alternative claim under the (d)(1) exception is valid. Despite the district court's characterization, the Secretary's invocation of the exception is not a *post hoc* rationalization. We are dealing here not with the reasoning by which an agency seeks to justify its actions, but with a pure question of law: Was the 1987 rule subject to the thiry-day waiting requirement? The answer is straightforward. The section 553(d) waiting period does not apply to "a substantive rule . . . which relieves a restriction," 5 U.S.C. § 553(d)(1); as the MarAd regulation is such a rule, it is not subject to the requirement.

As the statute itself relieves MarAd of any obligation to defer the effectiveness of its rule, it is under no obligation to make an explicit claim of the right to do so. *Cf. Hou Ching Chow v. Attorney General*, 362 F. Supp. 1288, 1292 (D.D.C. 1973) (rejecting agency's proffered reason for dispensing with the thirty-day waiting period but holding *sua sponte* that the challenged rule granted an exemption within the meaning of subsection (d)(1)). By way of contrast, the good cause exception must be claimed because the statute explicitly requires agencies to assert affirmatively their exemption "for good cause found *and published with the rule*." 5 U.S.C. § 553(d)(3) (emphasis added). In sum, the good cause exception must be invoked and justified; the (d)(1) exception applies automatically.

Appellees contended, at oral argument, that the (d)(1) exception did not apply in instances, such as the present one, where a thirty-day waiting period might benefit third parties. Although they were unable to supply specific references, appellees claimed that the APA's legislative history and the *Attorney General's Manual on*

the Administrative Procedure Act supported their position. Having consulted both sources, we can find nothing in the former that touches on this question, while the latter actually contradicts appellees' position:

> The fact that an interested person may object to such issuance, amendment, or repeal of a rule does not change the character of the rule as being one "granting or recognizing exemption or relieving restriction", thereby exempting it from the thiry-day requirement.

Attorney General's Manual on the Administrative Procedure Act 37 (1947).

2. *The Agency's Explanation of the Rule*

The district court also found the 1987 regulation to be arbitrary and capricious, and therefore unlawful under 5 U.S.C. § 706(2)(A) (1982), because it found MarAd's explanation to be inconsistent with the evidence before the agency and the objectives of the Merchant Marine Act. Mem. Op. at 13-18. We respectfully disagree.

In *ITOC II*, we held that the statement of basis and purpose for the 1985 rule was inadequate because the Secretary had failed "to provide a sufficiently reasoned discussion of why [the 1985] rule was adopted and alternatives were rejected in light of the policies of the Merchant Marine Act." 809 F.2d at 851. In her explanation of the 1985 rule, the Secretary had relied on policies, such as economic efficiency, use of underemployed resources, increased competition, and deregulation, that are not explicitly listed among the Merchant Marine Act's stated goals. At the same time, she failed to explain why they were "implicit in or compatible with the statutory objectives." *Id.* at 853.

The preamble of the Act states that its purpose is to

> further the development and maintenance of an adequate and well-balanced American merchant marine,

> to promote the commerce of the United States, [and] to aid in the national defense. . . .

Pub. L. No. 74-835, 49 Stat. 1985 (1936). Section 101 of the Act provides:

> It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States, insofar as may be practicable, (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel, and (e) supplemented by efficient facilities for shipbuilding and ship repair. It is declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine.

46 U.S.C. § 1101 (1982).

The Administrator asserts that the 1987 rule promotes two statutory objectives. First, by allowing the VLCC's to remain in the domestic fleet, the rule promotes the goal of ensuring that the "most suitable types of vessels" will make up the merchant marine. He defines suitability to mean "suitability of particular vessels for the U.S. commerce, and suitability of vessels to serve as naval auxiliaries." 52 Fed. Reg. at 23,525. Second, the Administrator maintains that the rule ensures that the U.S. merchant marine will be a "well-balanced" fleet

> composed of a mix of vessels that are suitable for serving particular trades. While VLCCs are more suitable than smaller, handy-sized tankers for the long-haul, high volume crude oil trades, e.g., Valdez-Panama, handy-sized tankers . . . are better suited than VLCCs for U.S. coastwise trades.

Id. at 23,527.

Appellees argue that the VLCCs will not increase the fleet's suitability because other tankers are newer, better designed, safer, faster, and more fuel efficient. These arguments, however, do not undermine the premise behind the Administrator's conclusion—namely, that the VLCCs feature economies of scale that make them particularly appropriate for the long Alaska-to-Panama trip. *See, e.g., id.* at 23,526 ("In port, costs per ton increase with ship size; at sea, however, costs per ton decline with ship size.")

Appellees also contest the agency's finding that the tankers will contribute to a "well-balanced" fleet. They argue that the Alaska-Panama route will soon expire because of a decrease in the production of Alaskan Oil and because of the advent of a new pipeline from California to Texas that will obviate the need for shipments from Alaska to Texas through Panama. The Administrator acknowledges that demand on the Alaska-Panama route might decrease in the future (*id.* at 23,530) but nevertheless concludes that the rule's benefits outweigh its detriments.

In *ITOC II*, we complained that the agency had given only cursory treatment to the rule's effect on domestic trade. 809 F.2d at 852. This deficiency has been corrected. First, the Administrator explores the problem of excessive tonnage and concludes that the rule will not exacerbate it. On the contrary, he finds that the presence of the three VLCCs in the domestic fleet "has stabilized the trade by allowing permanent entry of a limited num-

ber of suitable tankers into the [Alaskan-Panama] trade instead of the uncertainty of the six-month waivers for an uncertain number of VLCCs." 52 Fed. Reg. at 23,530. Second, the Administrator argues that if the VLCCs left the domestic trade, the increased use of smaller ships with higher costs per ton-mile would result in higher rates for crude oil transportation, with a consequent diversion to pipelines that would reduce overall tanker employment. *Id.*

In *ITOC II*, we also found that the agency had not dealt in sufficient detail with the rule's effect on the goal of ensuring that the U.S. merchant marine be capable of carrying "a substantial portion of the water-borne export and import foreign commerce of the United States." *See* 809 F.2d at 852-53. In his discussion of the rule, the Administrator asserts that in view of the world oversupply of tankers and the higher operating costs experienced by U.S. flag vessels, the likely result of the removal of the VLCC's from domestic trade is that they would be scrapped rather than used in international shipping. 52 Fed. Reg. at 23,529.

Appellees contend that MarAd should have responded to this situation by providing the three VLCCs with "operating-differential subsidies," *see* 46 U.S.C. § 1173 (a), rather than transferring them to the domestic fleet. The agency rejected this alternative because, among other things, the price "would be exhorbitant . . . approximately $5 million annually per ship. . . . There would be no incentive for efficient operation, and the Government would become the guarantor of profitable operation." 52 Fed. Reg. at 23,523.

One could argue that this cost is the price we should be ready to pay to achieve the explicit congressional objective of a U.S. merchant fleet that is capable of meeting domestic needs as well as carrying "a substantial portion" of U.S. water-borne import and export commerce "at all times." 46 U.S.C. § 1101. The Secretary, how-

ever, has been vested with the authority to determine when operational subsidies should be provided, not the courts.

In *ITOC II*, we found that the agency had not satisfactorily addressed the 1985 rule's impact on the Act's goal of maintaining a merchant marine capable of serving as a naval auxiliary, and noted a Navy warning that the rule might result in the loss of certain "handy-sized" tankers. 809 F.2d at 853. Appellees argue that the 1987 rule will undermine national defense because the VLCCs will drive out smaller ships that would prove more useful to the Navy in the event of war. *Id.* The Navy, however, has expressed its support for the 1987 rule, Admin. Rec. at 1289 (letter dated June 10, 1987 from Dep't of the Navy to MarAd), and certified the three VLCC's as militarily useful. 52 Fed. Reg. at 23,526. Under these circumstances, we cannot conclude that MarAd has failed to consider the rule's impact on national security.

The Administrator addresses the 1987 rule's impact on two of the Act's other goals. He acknowledges that retaining the VLCC's in the domestic trade will result in a net loss of up to 300 jobs for U.S. seamen. *Id.* at 23,531. On the other hand, he rejects appellees' contention that the 1987 rule will hurt the U.S. shipbuilding business by depriving it of the opportunity to build new ships arguing that retaining the three VLCCs in the domestic trade is unlikely to have a "significant adverse effect" on U.S. shipyards. He asserts that it is doubtful that any company would build new VLCCs because of their high construction costs and the probable decline in the volume of oil that will be shipped from Alaska to Panama in the 1990's. Nor would shippers build smaller tankers as substitutes for the VLCCs because they would be unsuitable for the Alaska-Panama route. The Administrator maintains that if the rule is set aside, other CDS-built tankers will likely fill the resulting shortage

by applying for temporary permission to ship domestically, as permitted under the Act. *Id.* at 23,527-28.

Finally, in *ITOC II*, we criticized the Secretary because her explanation for the rejection of alternatives to the 1985 rule focused on non-statutory criteria that favored the rule, while admitting that the rule created "problems that impinge on the statutory objectives and that might be avoided under some of the alternative measures." 809 F.2d at 854. In his statement in support of the present rule, the Administrator examines each of the alternatives in terms of the Act's objectives and persuasively argues that because of the suitability of the VLCCs for the Alaska-Panama route, the rule better serves the Act's overall goals. 52 Fed. Reg. at 23,534-35.

We conclude that the Administrator has cured the shortcomings we identified in *ITOC II* and provided a sufficient statement of basis and purpose for the 1987 rule. As he concedes, the rule will result in some reduction in employment. While this is unfortunate, this court has previously acknowledged that the Department may not be able to pursue all of the Act's goals simultaneously:

> It may be, of course, that present conditions in the world shipping market make it impossible for the Secretary to find a way to meet all of the statutory objectives. If this is the problem, she should discuss it frankly and directly when she considers which measures to adopt in light of the objectives explicitly set out in the Act.

ITOC II, 809 F.2d at 854 n.4. In the case before us, the agency has exhibited the required candor. While some of its judgments are no doubt controversial, Congress has entrusted them to the agency, and not the courts. We also find that while others might interpret the evidence in different ways, the Administrator's conclusions have adequate support in the record. We therefore find that

MarAd acted neither arbitrarily nor capriciously, but in full accord with its legal responsibilities and the purposes of the Act.

3. *Preemption of Legislative Action*

The district court suggests that the 1987 rule must be set aside because MarAd had advance notice of congressional opposition to CDS repayments and, therefore, should have deferred publication until Congress had had the opportunity to make its will known:

> Rather than heed the command of Congress, the agency chose to outrace Congress by issuing a final rule before Congress could complete the legislative process. The agency's action was nothing more than an attempt to subvert the will of Congress, and thus, cannot stand.

Mem. Op. at 5-6.

We offer two comments. First, while the agency was fully aware that there was strong congressional opposition to the rule, it was by no means clear that the final version of the appropriations bill would contain section 505 because the Senate had already been persuaded to drop the section from its version of the Supplemental Appropriations Act. Second, however unseemly a race to preempt congressional action may at times appear, we know of no principle that holds that the executive branch must stay its hand whenever it learns that the legislative branch may change the law. We say this notwithstanding the district court's reference to our decision in *National Treasury Employees Union v. Devine*, 733 F.2d 114 (D.C. Cir. 1984). Mem. Op. at 8-11.

Devine is readily distinguishable. That case involved controversial changes in federal personnel practices that the Office of Personnel Management ("OPM") had first proposed on March 30, 1983 and then incorporated in modified form in proposed regulations that it issued on July 14, 1983. One month later, on August 15, Congress

adopted an appropriations rider similar to section 505 that forbade the commitment or expenditure of any funds to implement OPM's March 30 or July 14 proposals before October 15, 1983. 733 F.2d at 115. Immediately following the expiration of the rider, OPM published a somewhat modified form of the same regulations, with an effective date of November 25, 1983. In the meantime, on November 12, Congress passed another funding resolution again barring OPM from committing or expending any funds to implement or administer the regulations that would take effect thirteen days later. *Id.* at 115-16.

We found clear indications in the legislative history that Congress "wished to prevent the effectuation of major changes in personnel management policies before it had an adequate opportunity to consider possible legislative solutions." *Id.* at 120. We also stated, in *dicta*, that "even assuming *arguendo* that the regulations could be implemented workably without further participation by the OPM, it is evident that Congress intended to prevent" the implementation of the proposed regulations. *Id.* at 120. Nevertheless, *Devine* is inapposite because we found that OPM's final regulations were incapable of implementation not because they had been invalidated by congressional action, but because OPM, which "had to play a critical and continuing role in their implementation, administration, and enforcement," had been denied the funds required to put them into effect. *Id.* at 119. By contrast, MarAd need not take any further action before the 1987 rule becomes fully operational. *See* discussion below at 20.

B. Section 505

Section 505 of the Appropriations Act reads as follows:

> None of the funds appropriated or made available by this or any other Act or otherwise appropriated or made available to the Secretary of Transportation or the Maritime Administrator for purposes of administering the Merchant Marine Act, 1936, as

> amended (46 U.S.C. 1101 et seq.), shall be used by the United States Department of Transportation or the United States Maritime Administration to propose, promulgate, or implement any rule or regulation, or, with regard to vessels which repaid subsidy pursuant to the rule promulgated by the Secretary May 3, 1985 and vacated by Order of the U.S. Court of Appeals for the D.C. Circuit January 16, 1987, conduct any adjudicatory or other regulatory proceeding, execute or perform any contract, or participate in any judicial action with respect to the repayment of construction differential subsidy for the permanent release of vessels from the restrictions in section 506 of the Merchant Marine Act, 1936, as amended: *Provided*, That such funds may be used to the extent such expenditure relates to a rule which conforms to statutory standards hereafter enacted by Congress.

The district court held that section 505 voided the 1987 rule because

> Congress' choice of language indicates an intent to bar the agency from promulgating any CDS repayment rule as of the date of the Court of Appeals' decision, January 16, 1987 until or unless it acted later.

Mem. Op. at 7. As Congress acted almost six months following our decision in *ITOC II* and nineteen days after publication of the 1987 rule, the court's holding requires that the section be given retrospective effect. We therefore, evaluate the court's interpretation in light of the principle of statutory construction providing that

> a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be "the inequivocal and inflexible import of the terms, and the manifest intention of the legislature."

United States v. Security Indus. Bank, 459 U.S. 70, 79 (1982) (citation omitted) (ellipsis in original).

We find it difficult to reconcile the district court's interpretation with the plain language and stated purpose of section 505. Although it refers to the *ITOC II* decision, section 505 applies to any CDS repayment arrangement, and it operates exclusively as a restriction on the expenditure of appropriated funds. Such a prohibition is inherently prospective as the language does not purport to reach expenditures already made. Moreover, the provision that no funds "*shall be*" used for the enumerated purposes speaks only to future expenditures. *See* 1A C. Sands, *Sutherland Statutory Construction* 693 (4th ed. 1985) ("It is obvious that the word 'shall,' in itself, cannot 'include' the past.").

Appellees offer two alternative reasons why section 505 must be given retrospective effect despite the prospective thrust of its language. First, they contend that interpreting section 505 as allowing the 1987 rule to stand would render it a nullity because the Department had indicated before section 505 was enacted that it would not accept repayment from any CDS vessels other than the three that were the subject of the 1987 rule. Therefore, appellees argue, as the section applies exclusively to the three VLCCs, we must reject a construction that would give the section prospective effect only because that would deprive Congress' action of meaning. We find this argument unconvincing for several reasons: It presupposes that the statutory language is susceptible to an alternative construction, which we find it not to be; it ignores the fact (as appellees themselves call to our attention in their appeal to legislative history) that a number of members of Congress believed that section 505 would nullify the rule through the prospective denial of funds for its implementation (*see, e.g.*, 134 Cong. Rec. S9142 (daily ed. July 1, 1987) (remarks of Sen. Hollings); 134 Cong. Rec. H2792 (daily ed. July 8, 1987) (remarks of Rep. Carr); 134 Cong. Rec. S10866 (daily ed. July 29, 1987) (remarks of Sen. Mikulski)); and finally, section 505 could well have been intended to guard

against the possibility that the Department might change its mind and enter into repayment arrangements with additional CDS vessels.

Second, appellees argue that section 505's legislative history evidences Congress' intention that the appropriations measure apply retroactively to bar the 1987 regulation. That argument also founders on the stubborn fact that the statute, with its use of the verb "shall" and its focus on expenditures, cannot be read to apply retroactively. There being no ambiguity to be resolved, an appeal to legislative history is inappropriate. *See, e.g., Garcia v. United States*, 469 U.S. 70, 76 n.3 (1984) (" 'Resort to legislative history is only justified where the face of the Act is inescapably ambiguous.' ") (citation omitted); *Overseas Education Ass'n v. FLRA*, 876 F.2d 960 (D.C. Cir. 1989) (Buckley, J., concurring). While some proponents of section 505 may well have intended it to prevent MarAd from adopting the 1987 rule, we are nonetheless bound by its language, which accurately reflects Congress' decision to rely on the appropriations process to achieve its policy objectives. Restrictions on expenditures of appropriated funds are inherently prospective, and we have no authority to give them retroactive effect.

We now reach appellees' argument that section 505 effectively nullifies the 1987 rule because it bars the use of appropriated funds to implement it. According to appellees, MarAd must take two further actions before the 1987 rule becomes operative: It must amend the vessels' CDS contracts to delete the restrictions on domestic trading, and it must respond to the appellees' petitions for rehearing. MarAd asserts, however, and we agree, that because payment from the three VLCCs has already been received and because the tankers have operated domestically since 1985, the rule affirms the right of the ARCO INDEPENDENCE, ARCO SPIRIT, and BROOKLYN to remain in domestic commerce, and their contracts need not be amended to confirm this right.

Nor are we persuaded by appellees' remaining argument, which is based on a regulation that provides that "[t]he [Maritime] Administration's decision or order shall be stayed pending resolution by the Administration of a petition for reopening. . . ." 46 C.F.R. § 201.171 (1988). According to them, this regulation prevents the 1987 rule from going into effect until the agency responds to the petitions for reopening filed by ITOC and others. Section 201.171, however, only applies in instances where the agency has held a *formal* hearing. *Delta Steamship Lines, Inc.*, 22 S.S.R. 542, 543 (MSB 1983). As the 1987 rule was promulgated pursuant to an *informal* rulemaking, the regulation does not apply. *See* 52 Fed. Reg. 12,199 (1987) (initiating notice and comment rulemaking).

In sum, we find that section 505 neither retrospectively voids the 1987 rule nor prevents it from becoming fully operational. As appellees have amply demonstrated, interested members of Congress were fully aware of the rule's existence before the conference committee resolved the differences between the Senate and House versions of the Supplemental Appropriations Act. Had the conferees wished to vacate the 1987 rule, they could have done so simply by ordering its revocation. As they did not, our task is to apply the language they agreed upon and that Congress enacted into law.

III. Conclusion

Section 505 applies prospectively only, and because the Maritime Administrator is not required to take any further action to implement the 1987 rule, it remains in effect. Nor is the rule procedurally flawed. The Administrator was under no obligation to provide a thirty-day waiting period between issuance and effectiveness, and we find his statement of its basis and purpose to be sufficient. Accordingly, we reverse the judgment entered in the district court.

So ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-5313

INDEPENDENT U.S. TANKER OWNERS COMMITTEE *et al.*,
Petitioner

v.

SAMUEL K. SKINNER, in his capacity as Secretary of the US Department of Transportation, *et al.*,
Respondent

and consolidated cases

Before: Buckley and Williams, Circuit Judges, and Revercomb *, United States District Judge

ORDER

[Filed Nov. 2, 1989]

Upon consideration of the Petitions for Rehearing of appellees Seatrain Tankers, Inc., et al., American Trading Transportation Company, Inc. et al., and the Independent U.S Tanker Owners Committee, it is

ORDERED, by the Court, that the petitions are denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

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* of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a).

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-5313

INDEPENDENT U.S. TANKER OWNERS COMMITTEE *et al.*,
Petitioner

v.

SAMUEL K. SKINNER, in his capacity as Secretary of the US Department of Transportation, *et al.*,
Respondent

and consolidated cases

Before: Wald, Chief Judge; Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg and Sentelle, Circuit Judges

ORDER

[Filed Nov. 2, 1989]

The Suggestions For Rehearing *En Banc* of appellees Seatrain Tankers, Inc., et al., American Trading Transportation Company, Inc. et al., and the Independent U.S. Tanker Owners Committee have been circulated to the full Court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of any suggestion. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestions are denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Circuit Judge Mikva would grant the suggestions for rehearing *en banc*.

Circuit Judge Silberman did not participate in this order.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 87-1685

INDEPENDENT U.S. TANKERS OWNERS COMMITTEE, *et al.*,
Plaintiffs,

v.

JAMES H. BURNLEY, IV, *et al.*,
Defendants.

C.A. No. 87-2102

OVERSEAS SHIPHOLDING GROUP, INC., *et al.*,
Plaintiffs,

v.

JAMES H. BURNLEY, IV, *et al.*,
Defendants.

OPINION OF CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

[Filed Apr. 29, 1988]

I. INTRODUCTION

These consolidated actions are before the Court on cross-motions for summary judgment.[1] The facts are not disputed. Plaintiffs challenge a final rule issued by the Secretary of Transportation through the Maritime Ad-

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[1] These actions were consolidated by Order of the Court dated September 10, 1987.

ministration ("MARAD") on June 22, 1987. 52 Fed. Reg. 23522. This rule would reaffirm prior agency action that allowed four Very Large Crude Oil Carriers ("VLCCs") built with construction differential subsidies ("CDS") to re-pay these subsidies, with interest, as a condition for entering the domestic trade. *See* 50 Fed. Reg. 19170.[2] This rule previously had been vacated by the Court of Appeals for the District of Columbia in *Independent U.S. Tanker Owners Committee v. Dole*, 809 F.2d 847 (D.C. Cir. 1987) on the ground that the Secretary's statement of basis and purpose failed to give an adequate account of how the payback rule served the objectives of the Merchant Marine Act. The Court of Appeals specifically found fault with the Secretary's cursory treatment of these objectives and her substitution of non-statutory criteria for Congress' stated objectives in the Act. *See id.* at 852, 854. Thus, on remand, the Secretary was afforded the opportunity to square the policies underlying the CDS repayment rule with the objectives of the Merchant Marine Act. *Id.* at 854. As a result of the Court of Appeals' decision, handed down January 16, 1987, the payback rule would have been vacated six

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[2] This rule permitted any tanker vessel built with a construction differential subsidy, and which had been barred from competing in the domestic trade on account of that subsidy, to enter the domestic trade upon repayment of the unamortized portion of the subsidy, plus interest. *See* Independent U.S. Tanker Owners Committee v. Dole, 809 F.2d at 850. Tanker vessels over 100,000 DWT (deadweight tons) were given a one-year period that began June 6, 1985 in which to apply for repayment. Ultimately, three VLCCs took advantage of the rule. These vessels are the *Arco Independence*, the *Arco Spirit*, and the *Brooklyn*. The rule at issue in the instant case also would confirm the CDS repayment, wtih interest, and recission of the domestic trading restriction of the *Bay Ridge*. This ship had entered the domestic trade in 1980 pursuant to a rulemaking, 45 Fed. Reg. 68393 (October 15, 1980). That rulemaking was vacated in Independent U.S. Tanker Owners Committee v. Lewis, 690 F.2d 908 (D.C. Cir. 1982). Accordingly, the rule in question would allow these four vessels to enter, sail, and compete in U.S. trade and commerce.

months later unless the Secretary had taken further action in the interim. *See id.* at 855.

Plaintiffs, owners and operators of U.S.-flag tankers employed in the domestic trade, have challenged this latest rulemaking on a variety of grounds.[3] The plaintiffs contend that the rule is invalid because it contravenes the express will of Congress, constitutes arbitrary and capricious action, lacks an adequate explanation of the existence of "good cause" to make the rule effective upon publication, violates the agency's own procedures, and fails to comply with the National Environmental Policy Act. Because Congress clearly intended to block the challenged rulemaking, the Court will grant summary judgment for the plaintiffs. Furthermore, the Court finds that the rulemaking is arbitrary and capricious in violation of 5 U.S.C. § 706(2)(A) and that the agency lacked "good cause" to make the rule effective upon publication pursuant to 5 U.S.C. § 553(d).

II. THE CHALLENGED CDS REPAYMENT RULE CANNOT STAND BECAUSE CONGRESS CLEARLY INTENDED TO PROHIBIT IT WHEN IT ENACTED SECTION 505 OF THE SUPPLEMENTAL APPROPRIATIONS ACT OF 1987

The Court concludes that Congress clearly intended to bar the challenged rule when it enacted Section 505 of

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[3] The plaintiff in C.A. No. 87-1685 is Independent U.S. Tanker Owners Committee. Plaintiff-intervenors in this action are American Trading Transportation Co., Inc., Cove Maritime Companies, Inc., Crest Tankers, Inc., Falcon Carriers, Inc., Keystone Shipping Company, Sun Transport, Inc., Trinidad Corp., and Victory Carriers, Inc. The plaintiff in C.A. No. 87-2102 is Overseas Shipholding Group, Inc. Plaintiff-intervenors in this action are Seatrain Tankers, Inc., Richmond Tankers, Inc., and Stuyvesant Tankers Corp. The defendants in both these actions are the Secretary of Transportation and the Department of Transportation. Defendant-intervenors in these actions, American Petrofina, Inc., SPC Shipping, Inc., Atlantic Richfield Co., and the State of Alaska, support the agency's rulemaking.

the Supplemental Appropriations Act of 1987. The Court of Appeals withheld issuance of its mandate vacating the subsidy repayment rule for six months in order to give the agency time to square the rule in terms of compliance with the objectives of the Merchant Marine Act. Rather than permit the agency the opportunity to reconcile the rule with the Act, Congress moved decisively to end the rulemaking altogether. The agency knew that Congress opposed CDS repayment and that it was in the process of legislating that opposition. The agency's attempt to outrace Congress on this issue cannot be given effect. In light of Congress' clear intent, the Court finds that Section 505 of the Supplemental Appropriations Act of 1987 applies directly to the challenged rule. Therefore, the rule must be vacated.

The plaintiffs have argued that, by enacting Section 505 of the Supplemental Appropriations Act of 1987, Congress intended to prohibit the agency from implementing any payback rule that does not conform to the statutory standards enacted by Congress, and, specifically, the rule promulgated by the agency and challenged in the instant action.[4] The defendants and defendant-intervenors dispute this contention and claim that to apply Section 505 so as to invalidate the rule is to give the law retroactive effect or to sanction repeal of the regulation by implication.[5] The defendant-intervenors further argue that Section 505 of the Supplemental Appropriations Act of 1987, on its face, operates prospectively from

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[4] *See* Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment ("Plaintiffs' Memorandum") at 15-26.

[5] *See* Defendants' Statement in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendants' Motion for Summary Judgment ("Defendants' Statement") at 17-25; Memorandum of Points and Authorities of Defendant-Intervenors' Opposition to Plaintiffs' Motion for Summary Judgment ("Defendant-Intervenors' Memorandum") at 28-30.

the date of enactment. The Court disagrees with the defendants' and defendant-intervenors' position.

A. *The Agency Should Have Deferred Publication of the CDS Repayment Rule Until Congress Completed Consideration of the Funding Measure*

As an administrative agency, MARAD is required to follow a congressional mandate. *See Summit Nursing Home, Inc. v. United States*, 572 F.2d 737, 742 (Ct. Cl. 1978). Congress' position in opposition to CDS repayment was well known to the agency. In fact, the agency was aware that Congress was actively considering a CDS repayment prohibition so as to prevent any subsidy repayment following the Court of Appeals' January 16, 1987 decision. Rather than heed the command of Congress, the agency chose to outrace Congress by issuing a final rule before Congress could complete the legislative process. The agency's action was nothing more than an attempt to subvert the will of Congress, and thus, cannot stand.

The challenged rule was issued in final form in the Federal Register on June 22, 1987. The Supplemental Appropriations Act of 1987 containing the prohibition against just such a rulemaking was signed into law by the President on July 11, 1987. As of the date of publication of the final rule in the Federal Register, the House of Representatives had already voted in favor of the prohibition. Furthermore, House and Senate conferees were already discussing the differences between the two versions of the funding measure, including the prohibition, when the rule was published.[6] The conferees ultimately reported a bill that contained the original House language barring any CDS repayment rule. The language of Section 505 specifically and expressly addresses any rule-

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[6] The Sentae version of the Supplemental Appropriations Act of 1987 did not contain any language dealing with a CDS repayment rule.

making regarding CDS repayment that the agency might undertake as a result of the Court of Appeals decision in *Independent U.S. Tanker Owners Committee v. Dole*, 809 F.2d 847 (D.C. Cir. 1987). Section 505 provides:

> None of the funds appropriated or made available by this or any other Act or otherwise appropriated or made available to the Secretary of Transportation or the Maritime Administrator for purposes of administering the Merchant Marine Act, 1936, as amended (46 U.S.C. 1101 *et seq.*), shall be used by the United States Maritime Administration to propose, promulgate, or implement any rule or regulation, or, with regard to vessels which repaid subsidy pursuant to the rule promulgated by the Secretary May 3, 1985 and vacated by Order of the U.S. Court of Appeals for the D.C. Circuit January 16, 1987, conduct any adjudicatory or other regulatory proceeding, execute or perform any contract, or participate in any judicial action with respect ot the repayment of construction differential subsidy for the permanent release of vessels from the restrictions in section 506 of the Merchant Marine Act, 1936, as amended: *Provided*, That such funds may be used to the extent such expenditure relates to a rule which conforms to statutory standards hereafter enacted by Congress.

Clearly Congress intended to bar the agency from promulgating this CDS repayment rule here involved until or unless the Congress later laid down the standard by which it could be done. Congress' choice of language indicates an intent to bar the agency from promulgating any CDS repayment rule of the date of the Court of Appeals' decision, January 16, 1987 until or unless it acted later.

Rather than await the legislative outcome when it knew that Congress was seriously and actively addressing this issue, MARAD decided it would determine merchant ma-

rine policy rather than follow Congress' direction. "It is not for an administrative agency, however, to preempt Congressional action or to 'fill in' where it believes some federal action is needed." *Office of Consumers' Counsel v. FERC*, 655 F.2d 1132, 1152 (D.C. Cir. 1980). Here Congress acted decisively and with unmistaken clarity in declaring that no funds could be used, and the agency clearly violated this mandate. The agency should have deferred publication of the rule pending a determination by Congress as to whether, and to what extent, a prohibition on a CDS repayment rule was necessary and appropriate. Moreover, had it waited, the agency would have been in a better position to develop a policy consistent with congressional intent. It is the first branch of government which makes laws, and it is for the second branch to execute the laws consistent with congressional authority and mandates. *See generally Lyng v. Payne*, 106 S. Ct. 2333, 2341 (1986); *Stallings v. Harris*, 493 F. Supp. 956, 958 (D. Tenn. 1980) (citing *Stark v. Wickard*, 321 U.S. 288, 309 (1944)).

B. *In a Situation Similar to this Case, the Court of Appeals for this Circuit Held that, Where an Agency Issued Final Regulations Prior to Enactment by Congress of a Statutory Ban on Such Regulations, the Regulations Were Null and Void*

The Court finds that the present case is strikingly similar, albeit not identical, to *NTEU v. Devine*, 733 F.2d 114 (D.C. Cir. 1984), *aff'g*, 577 F.Supp. 738 (D.D.C. 1983). In that case, the Court of Appeals struck down regulations promulgated prior to passage of legislation containing language prohibiting OPM from promulgating and implementing new federal personnel regulations because it found, *inter alia*, a clear indication that Congress intended that those regulations should not be allowed to take effect The Court finds in this case that Congress did not want the agency promulgating or implementing the rule challenged here.

In *NTEU v. Devine*, the Office of Personnel Management proposed changes in federal personnel practices by way of a rulemaking. Congress opposed these changes and moved to enact legislation prohibiting the promulgation and implementation of any such rules. While Congress was actively considering a legislative proposal to bar the proposed rules, the agency issued final regulations. The agency argued, among other points, that the subsequently passed legislation had no effect on the regulations it had issued because it was not required to take any subsequent steps to implement the regulations. Although it found that the agency had much to do in order to implement the regulations, and thus ran afoul of the express prohibition in the statute against agency action, the Court of Appeals held that nevertheless, the regulations were null and void because they contradicted congressional intent. The Court of Appeals would not permit the agency to beat Congress to the punch by enacting regulations which Congress opposed before Congress had an opportunity to enact a prohibition.

The Court finds that the instant situation closely mirrors that which existed in *NTEU v. Devine*. In both cases, Congress was actively considering a prohibition on a discrete agency rulemaking that the agency moved to issue in final form before Congress completed its consideration. However, in *NTEU v. Devine*, OPM issued its final regulations only after the House Appropriations Committee had recommended that the regulations be barred. In this case, the House of Representatives had voted in favor of the prohibition on a CDS payback rule, and House and Senate conferees were in the process of discussing that prohibition.

The agency attempts to distinguish *NTEU v. Devine* on the ground that the decisions of the District Court and the Court of Appeals turned on a finding that, contrary to OPM's assertions, the regulations were not self-enforcing or self-administering. *See* Defendants' Statement at 23-24. In contrast, MARAD argues that it does

not need to "take any steps to implement a rule which merely affirms what has already occurred." *Id.* at 24. The agency claims that "the court in *Devine* never suggested that actions taken pursuant to OPM's regulations prior to enactment of the funding bar were invalid." *Id.* To the contrary, the Court of Appeals, in *dicta*, found that "even assuming *arguendo* that the regulations could be implemented workably without further participation by the OPM, it is evident that Congress intended to prevent this." 733 F.2d at 120.

In this case, the Court finds that Congress clearly intended to bar promulgation of any rule authorizing CDS repayment as of January 16, 1987 through enactment of Section 505 of the Supplemental Appropriations Act of 1987. At least as early as March 25, 1987, the agency was on notice that Congress was considering barring a repayment rule when the House of Appropriations Committee reported a bill containing the prohibitory language. On the day that the House passed the CDS payback prohibition, Representative Jones, Chairman of the House Merchant Marine and Fisheries Committee, stated on the floor of the House that the language was aimed at the Notice of Proposed Rulemaking by MARAD regarding the rule. *See* Cong. Record H2202 (April 23, 1987). Therefore, in light of the clear indication that Congress intended to bar the subsidy payback rule here challenged and mindful of the Court of Appeals' decision in *NTEU v. Devine*, this Court finds that Section 505 of the Supplemental Appropriations Act of 1987 prohibits the implementation of the rule published by the Secretary of Transportation in the Federal Register on June 22, 1987.

C. *Section 505 of the Supplemental Appropriations Act of 1987 Is a Valid Exercise of Legislative Authority and Does Not Operate Retroactively Or Repeal the Contested Rulemaking By Implication*

Section 505 of the Supplemental Appropriations Act of 1987 does not operate retroactively nor does it have the

effect of repealing the challenged rule by implication. Congress intended that the agency not promulgate or implement any CDS repayment rule following the decision handed down by the Court of Appeals on January 16, 1987. Furthermore, there can be no argument that this legislation repeals the rule by implication. Congress expressly barred any CDS repayment rule, including the one challenged here, when it passed this legislation.

In spite of Congress' clear intent to bar promulgation of the rule, the agency and the defendant-intervenors nevertheless argue that Section 505 cannot be given retroactive effect nor can it be given effect so as to repeal the rulemaking by implication. *See* Defendant's Statement at 29; Defendant-Intervenors' Memorandum at 28. They argue that the words "shall be used" connote a meaning that the prohibition was to take effect from the date of enactment. This argument is unavailing. The word "shall" is language of command in a statute. *See Association of American Railroads v. Costle*, 562 F.2d 1310, 1312 (D.C. Cir. 1977) (footnote omitted). The interpretation pushed by the agency and the defendant-intervenors "can be defeated by indications of legislative intent to the contrary or by obvious inferences from the structure and purpose of the statute." *United States v. Rodgers*, 461 U.S. 677, 706 (1983) (citation omitted). The Court concludes that Congress clearly intended this section to take effect following the Court of Appeals' decision in *Independent U.S. Tanker Owners Committee v. Dole*, 809 F.2d 847 (D.C. Cir. 1987). Although amending the section to specifically cover the June 22, 1987 rulemaking might have been prudent, it certainly was not essential in view of the fact that the language of, and expressed rationale for, the legislation indicated its applicability to the final rule. *See NTEU v. Devine*, *supra*, 733 F.2d at 118.

The Court realizes that *TVA v. Hill*, 437 U.S. 153, 190 (1978), relied on by the defendants and the

defendant-intervenors, stands for the proposition that substantive changes in the law by means of appropriations bills are to be narrowly construed and that repeal of laws by implication is disfavored. However, this case does not implicate that doctrine. With this in mind, the Court finds that Section 505 does not repeal the rule by implication since this provision expressly prohibits the CDS repayment rule. *See NTEU v. Devine*, 577 F. Supp. 738, 750 (D.D.C. 1983), *aff'd*, 733 F.2d 114 (D.C. Cir. 1984).

III. THE CDS REPAYMENT RULE IS ARBITRARY AND CAPRICIOUS BECAUSE IT IS NOT CONSISTENT WITH THE OBJECTIVES OF THE MERCHANT MARINE ACT AND, THEREFORE, MUST BE VACATED

Notwithstanding the Court's conclusion that the agency acted contrary to the express terms of Section 505 of the Supplemental Appropriations Act of 1987, the Court finds that this rulemaking is "arbitrary, capricious, an abuse of discretion or not otherwise in accordance with law." 5 U.S.C. § 706(2)(A). "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983). "To assure that the necessary factual support for the finding exists, the reviewing court must examine the evidence in the existing administrative record." *Center for Auto Safety v. Dole*, 828 F.2d 799, 810 (D.C. Cir. 1987). In this case, the agency rule is arbitrary and capricious because it has relied on factors which Congress has not intended it to consider and because it has offered an ex-

planation for its decision that runs counter to the evidence before it. Accordingly, the rule must be vacated.

The agency must provide an adequate statement of basis and purpose, of how this rule "*directly further*[*s*] the general goals of the [Merchant Marine] Act." *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 588 (1980) (emphasis added); *see also Independent U.S. Tanker Owners Committee v. Dole*, 809 F.2d 847, 852 (D.C. Cir. 1987). Here, the agency has acknowledged that the evidence on the record leads to the conclusion that the challenged rule will not further most of the objectives of the Act. However, the agency decided that the advantages of efficiency and transportation savings outweigh the net adverse impact on vessels and seaman in the domestic trade. *See* 52 Fed. Reg. at 23524. A rule supported by non-statutory criteria at the expense of the express objectives of the Act is arbitrary and capricious.

A. *The Agency's Explanation in Support of the Rule Runs Counter to the Evidence in the Record and Is Therefore Arbitrary and Capricious*

The goals of the Merchant Marine Act are to develop and encourage the maintenance of a U.S. merchant marine that is:

> (a) sufficient to carry its domestic waterborne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States, insofar as may be practicable, (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen per-

> sonnel, and (e) supplemented by efficient facilities for shipbuilding and ship repair.

46 U.S.C. § 1101. The Court notes that "efficiency" and "transportation savings" are not among the enumerated objectives of the Merchant Marine Act. The Secretary admits that this rule will not directly further many of the objectives of the Act. Nevertheless, the Secretary claims that the rule promotes the Act because the four VLCCs are suitable for the domestic trade and will promote and maintain a well-balanced fleet. *See* 52 Fed. Reg. at 23525, 23527. The evidence in the record suggests otherwise.

The agency admits that the rule will not directly further many of the statute's objectives. For example, "MARAD recognizes that the rule will not increase the participation of U.S.-flag vessels in the foreign trade." 52 Fed. Reg. at 23525; *see also id.* at 23528 ("MARAD acknowledges that [the rule] would not increase or decrease the U.S.-flag share of the water-borne export and import bulk foreign commerce of the United States.").[7] In addition, "MARAD also recognizes that this rule possibly will result in the lay-up or scrapping of a few smaller sized crude carriers sooner than would otherwise occur and that additional seamen possibly will become unemployed as a result." *Id.* at 23525. Furthermore,

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[7] The agency seeks to justify the rule's impact on the foreign trade fleet objective of the Merchant Marine Act by relying on a footnote in the Court of Appeals' decision in Independent U.S. Tanker Owners Committee v. Dole in which the Court admonished the Secretary to discuss present conditions in the world shipping market "frankly and directly." *See* 809 F.2d at 854 n.4. Rather than do so, the Secretary dismisses this objective by contending that because the current U.S.-flag foreign trade fleet cannot carry a substantial portion of U.S. foreign commerce, a lessening in the size of that fleet will make no difference. *See* 52 Fed. Reg. at 23528. Merely relying on a finding that surplus tonnage worldwide is at very high levels does not, *per se*, moot an objective of the Merchant Marine Act. *See id.* at 23529.

the agency acknowledges that "[w]hile this rulemaking will not actively promote this goal [of ensuring efficient facilities for shipbuilding and ship repair], it also will not have a significant advere (*sic*) effect on U.S. commercial shipbuilding." *Id.* at 23528. Such a statement leads this Court to believe that the rule will have at least some adverse effect on U.S. commercial shipbuilding.

MARAD does not contend that the Alaska North Slope-Panama ("ANS") trade lacks sufficient tonnage to transport Alaskan crude oil. Rather, it argues that there is a need for vessels that can take advantage of greater economies of scale and thus provide shippers with transportation savings. *Id.* at 23524. With these "suitable" vessels in the trade, the agency concludes that the fleet will be "well-balanced." The Court concludes that the agency's proffered justifications for the rule are belied by the evidence in the record and that, therefore, the rule is arbitrary and capricious.

By MARAD's own estimate, Alaskan oil production will decline in the very near future leading to a concomitant decrease in the need for tanker tonnage in the ANS-Panama trade. The agency has estimated that ANS tanker loadings are expected to fall *as soon as 1989* due to a decline in production, the opening of the All American Pipeline, and the potential construction of a refinery at Valdez, the output of which may be transported abroad by foreign-flag vessels. *See* 52 Fed. Reg. at 23530 (emphasis added). Thus, due to falling demand, these VLCCs, though so uniquely suited for the ANS-Panama trade, will be laid up.[8]

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[8] MARAD expects these VLCCs to be employed only in the ANS-Panama trade. Alaska North Slope oil is transported by pipeline across Alaska to a terminus located at Valdez. The oil is then loaded onto tankers bound for the U.S. West Coast or Panama. These vessels would not be used in the West Coast segment of the ANS trade if demand in the Valdez-Panama trade is insufficient to

In addition, the Court finds it significant that a number of vessels are idle and laid up. At present, the *Bay Ridge*, one of the VLCCs at issue in this rulemaking, is laid up. 52 Fed. Reg. at 23527. Furthermore, the VLCCs *BT Alaska* and *BT San Diego* have been idled since August 4, 1987. *See id.*[9] In addition, two unsubsidized VLCCs, the *Exxon Valdez* and the *Exxon Long Beach*, each totaling 209,000 DWT, recently went into service in the ANS-Panama trade. With three VLCCs currently laid up, the Court cannot condone a rulemaking that would add three more VLCCs to the domestic fleet as a rational decision on the part of the agency. Thus, the evidence in the record strongly suggests that the challenged rule will not further directly many of the objectives of the Merchant Marine Act. Therefore, because the explanation for its decision runs counter to the evidence before the agency, the rule must be struck down as arbitrary and capricious. *See Motor Vehicle Manufacturers Association, supra.*

B. *The Agency Cannot Rely on Non-Statutory Criteria Such as Efficiency and Transportation Savings to Support the Rule Because These Are Factors that Congress Did Not Intend the Agency to Consider In Promulgating a Rule Pursuant to the Merchant Marine Act*

Having admitted that this rulemaking will not directly further most of the goals of the Act as required by the Supreme Court's decision in *Seatrain Shipbuilding Corp.*, the agency contends that the rule will further "day-to-

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support all four VLCCs, given port constraints and the higher costs of lightering or operating the ships light loaded. 52 Fed. Reg. at 23530.

[9] Each of these vessels totals 188,100 DWT. Administrative Record at 1357. Their owner, Shell Refinery and Marketing Company, claims that these vessels may have to be scrapped due to the rulemaking. 52 Fed. Reg. at 23527.

day" commercial operations by allowing more suitable ships in the Alaska-Panama trade," 52 Fed. Reg. at 23524, and will result in a more well-balanced fleet "composed of a mix of vessels that are suitable for serving particular trades," 52 Fed. Reg. at 23527. MARAD continues to rely heavily on its claim that admission of these VLCCs into the domestic trade will enhance efficiency and create transportation savings. This may in fact be true, but it cannot be a justification for the rule. Reducing transportation costs is not an objective of the Merchant Marine Act. *See Independent U.S. Tanker Owners Committee v. Dole*, 809 F.2d at 853. By allowing these vessels to enter the trade, the agency sees a further benefit in the form of "bumping." [10] Bumping, according to the agency, will create a pool of small tankers available to meet peak seasonal demand in the upcoast (U.S. Gulf Coast/East Coast) trade. 52 Fed. Reg. at 23527. As of May 12, 1987 (the latest date measured by the agency in this rulemaking), 23 of these smaller, unsubsidized tankers were inactive.[11] The agency has not adequately explained how bumping directly furthers the objectives of the Act. In fact, the evidence in the record strongly suggests that this is not a beneficial effect of the rule. The agency recognizes that the rule will result

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[10] When these VLCCs are waived into the ANS-Panama trade, slightly smaller unsubsidized ships are "bumped" from that segment into the shorter segment from Valdez to the West Coast. Vessels engaged in that segment are then bumped into the Panama Canal-Gulf Coast and Panama Canal-East Coast segments of the trade forcing smaller unsubsidized ships out of business. *See* American Trading Transportation Co. v. United States, 791 F.2d 942, 948 (D.C. Cir. 1986). In that case, the Court of Appeals vacated and remanded the agency's decision to grant Section 506 waivers because MARAD had failed to give any consideration to the "bumping" effect. *See id.* at 948-49.

[11] Of this total, seven vessels totaling 312,000 DWT were laid up, 14 vessels totaling 636,600 DWT were temporarily idled, and two vessels totaling 204,000 DWT were casualties. 52 Fed. Reg. at 23527.

in layoffs of seamen. 52 Fed. Reg. at 23525, 23531. Furthermore, the agency foresees that smaller vessels, which are a critical component of the military's emergency auxiliary fleet, will be laid up or scrapped. *Id.* at 23525, 23530. Bumping appears to have the effect of forcing smaller, unsubsidized vessels out of business to make room for larger, previously subsidized ones. As the Court of Appeals stated in *American Trading Transport Co. v. United States*, 791 F.2d 942, 948 (D.C. Cir. 1986), the Merchant Marine Act "indicates no solicitude for the interests of large, subsidized vessels that overrides consideration of the interests or small, unsubsidized ships."

MARAD's explanation of its rejection of alternatives to this rule also relies on non-statutory criteria at the expense of the objectives of the Merchant Marine Act. The agency has rejected alternatives because they will not generate transportation savings nor offer possible environmental protections to the same extent as the rule. MARAD also justifies the rule on the ground that it will recoup subsidy payments[12] and increase Alaska state revenues. The agency even rejected one proposed alternative which involved admitting less than four VLCCs because it would not be fair to the excluded vessels. This focus on non-statutory criteria again renders the rule defective. *See Motor Vehicle Manufacturers Association, supra*; *Independent U.S. Tanker Owners Committee v. Dole, supra*, 809 F.2d at 854. MARAD never considered using Section 506 waivers as an alternative to the rule.[13]

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[12] The agency recognizes that the rule may result in U.S. Government defaults. 52 Fed. Reg. at 23534-35. When the cost of these defaults is combined with the increased outlay by the Navy to acquire ships that would otherwise be part of the merchant marine fleet, *see supra* at 16-17, the agency's rosy prediction that the national coffers will be replenished as a result of this rule is significantly tarnished.

[13] Under Section 506, a vessel constructed with CDS may, upon consent by the Secretary of Transportation, operate for up to six

The agency rejected using operating differential subsidies ("ODS") pursuant to 46 U.S.C. § 1173(b) on the ground that to do so would be too expensive. *See* Defendants' Statement at 13-14.[14] The rejection of the ODS option is never discussed by the agency in terms of how it helps or hinders the objectives of the Merchant Marine Act. Once again, the agency, in rejecting alternatives, has substituted goals other than those specified by Congress.

In consideration of the evidence in the record and the explanation offered by the agency, the Court concludes that the challenged rule is arbitrary and capricious pursuant to 5 U.S.C. § 706(2)(A). The agency has ignored the evidence in the record which shows that the rule will not directly further the objectives of the Merchant Marine Act. Instead, MARAD has substituted factors such as efficiency and transportation savings which the Congress did not intend for it to consider. Therefore, the rule must be vacated.

IV. THE AGENCY'S PROFFERED EXPLANATION OF WHY IT WAIVED THE STATUTORILY PRESCRIBED 30-DAY WAITING PERIOD BETWEEN THE RULE'S PUBLICATION DATE AND EFFECTIVE DATE FAILS TO CONVINCE THE COURT THAT "GOOD CAUSE" EXISTED

MARAD declared the CDS repayment rule effective upon publication stating that there was "good cause" to waive the 30-day waiting period required by 5 U.S.C.

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months of the year in the domestic trade upon payment of an amount that bears the same proportion to the CDS as such temporary period bears to the entire economic life of the vessel.

[14] The Secretary of Transportation may, with respect to any vessel in an essential bulk cargo carrying service . . . pay . . . such sums as he shall determine to be necessary to make the cost of operating such vessel competitive with the cost of operating similar vessels under the registry of a foreign country. 46 U.S.C. § 1173(b).

§ 553(d)(3). In support of the waiver, the agency argues that it was facing a judicially-imposed court deadline and, that, in any case, the public did not need time to prepare for the rule. *See* 52 Fed. Reg. at 23536. In their papers, the agency and the defendant-intervenors argue that because the rule "grants or recognizes an exemption or relieves a restriction," it may be made effective immediately upon publication in the Federal Register pursuant to 5 U.S.C. § 553(d)(1). *See* Defendants' Statement at 30; Defendant-Intervenors' Memorandum at 55. However, this rationalization was not offered by the agency when it published the rule.

The Court must reject the agency's invocation of § 553(d)(1) at this late date. The agency claimed the "good cause" exception pursuant to § 553(d)(3) when it published the rule. Courts may not accept *post hoc* rationalizations for agency action; if an agency's action is to be upheld, it must be so on the basis of the reason articulated by the agency. *See Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 50 (1983). This is a rule "directed at reviewing courts which forbids judges to uphold agency action on the basis of rationales offered by anyone other than the proper decisionmakers." *Local 814, International Brotherhood of Teamsters v. NLRB*, 546 F.2d 989, 992 (D.C. Cir. 1976). The rule applies to rationalizations offered for the first time in litigation affidavits and arguments of counsel. *Id. (citing Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971); *FPC v. Texaco, Inc.*, 417 U.S. 380, 397 (1974); *NLRB v. Food Store Employees Union, Local 347*, 417 U.S. 1, 9 (1974). Therefore, the Court cannot accept the agency's explanation, offered after it gets to Court and which was not articulated as a basis for the agency's action at the time the rule was published, that because the rule relieves a restriction, the agency may have been entitled to make the rule effective upon publication in the Federal Register.

In any event, the Court finds that the agency has not proffered grounds sufficient to establish that "good cause" existed to waive the 30-day period between the publication date and the effective date. The exceptions to the provision of § 553(d) permitting an agency to avoid its obligations to publish a rule not less than 30 days before its effective date "will be narrowly construed and only reluctantly countenanced." *See American Federation of Government Employees v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981) (*quoting State of New Jersey, Department of Environmental Protection v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980). The "good cause" exception is not an "escape clause" that may be arbitrarily utilized at the agency's whim. *See id.* (*citing* S. Rep. No. 752, 79th Cong., 1st Sess. (1945), *reprinted in* Administrative Procedure Act, Legislative History, 79th Cong. 1944-46 at 200, 201). The exception should be limited to emergency situations. *Id.* No such emergency existed in this case to justify making the rule effective immediately upon publication.

In support of its showing of "good cause," MARAD claimed that it was operating under a judicially-imposed deadline and that the public did not need time to prepare for the final rule. Neither of these reasons is adequate to invoke the "good cause" exception. While it is true that the agency was operating under something of a judicially-imposed deadline (the Court of Appeals' mandate vacating the blanket repayment rule was to take effect July 16, 1987), that fact alone is insufficient. MARAD's reliance on *American Federation of Government Employees v. Block*, *supra*, is misplaced. In that case, the Department of Agriculture invoked the "good cause" exception to the requirement that general notice of a proposed rulemaking be published in the Federal Register pursuant to 5 U.S.C. § 553(b)(B) because it was under a court order to issue certain regulations

forthwith. See id. at 1157.[15] No such urgency existed in this case to justify an immediate effective date. MARAD knew that Congress was actively considering a proposal to deal with any CDS repayment rule. The agency could have and should have allowed Congress a period of time in which to act. An effective date of July 15, 1987, one day prior to the effective date of the Court of Appeals' mandate, was the proper course of action.

Furthermore, the fact that the agency decides that the public does not need time to prepare for the rule does not, by itself, support a finding of "good cause." Both the statute and the legislative history envision a holding period to permit, in the words of the statute, "an interested person the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e); *see also* Note, *The "Good Cause" Exceptions: Danger to Notice and Comment Requirements Under the Administrative Procedure Act*, 68 Geo.L.J. 765, 771 n.57 (1980) (*quoting* S.Doc. No. 248, 79th Cong., 2d Sess. at 207 (The 30-day delay in the effective date "will afford persons affected a reasonable time to prepare for the effective date of a rule or rules or to take any other action which the issuance of the rules may prompt."). Although the general public might not have needed time to prepare for the final rule, persons affected, such as the plaintiffs, were entitled to at least some time to react to the agency's rulemaking before it became final.

Therefore, the Court finds that MARAD's explanation in support of its invocation of the "good cause" exception is insufficient and unavailing.

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[15] An agency may waive this requirement if it "for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B).

V. CONCLUSION

For the foregoing reasons, the Court must grant plaintiffs' motion for summary judgment and deny defendants' motion for summary judgment. Not only has the agency contravened the express intent of Congress as articulated in Section 505 of the Supplemental Appropriations Act of 1987, but it has also acted arbitrarily and capriciously in promulgating the CDS repayment rule. Furthermore, the agency impermissibly made the rule effective upon publication in the Federal Register. Therefore, the Court will declare the rule invalid and order that it be vacated.

An order in accordance with this Opinion will issue of even date herewith.

/s/ Charles R. Richey
CHARLES R. RICHEY
United States District Judge

Dated: April 29, 1988

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 87-1685

INDEPENDENT U.S. TANKER OWNERS COMMITTEE, *et al.*,
Plaintiffs,

v.

JAMES H. BURNLEY, IV, *et al.*,
Defendants.

C.A. No. 87-2102

OVERSEAS SHIPHOLDING GROUP, INC., *et al.*,
Plaintiffs,

v.

JAMES H. BURNLEY, IV, *et al.*,
Defendants.

ORDER

In accordance with the Opinion issued on even date herewith, it is by the Court this 29 day of April, 1988,

ORDERED that plaintiffs' motion for summary judgment be, and hereby is, granted; and it is

FURTHER ORDERED that defendants' motion for summary judgment be, and hereby is, denied; and it is

FURTHER ORDERED that the rule regarding constructional differential subsidy repayment issued by the Maritime Administration and published in the Federal Register on June 22, 1987, be, and hereby is, declared

arbitrary and capricious, an abuse of discretion, and contrary to law; and it is

FURTHER ORDERED that the rule referred to in the above-ordered paragraph be, and hereby is, vacated; and it is

FURTHER ORDERED that any vessel operating in the domestic trade of the United States pursuant to the rule held invalid in the above-ordered paragraph be removed from that trade as soon as is practical.

/s/ Charles R. Richey
CHARLES R. RICHEY
United States District Judge

APPENDIX E

DEPARTMENT OF TRANSPORTATION

Maritime Administration

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46 CFR Part 276

[Docket No. R-110]

Construction-Differential Subsidy Repayment

AGENCY: Maritime Administration, Transportation.

ACTION: Final rule.

SUMMARY: This final rule allows four vessels that repaid their construction-differential subsidy (CDS) in exchange for the right to operate in the domestic trade to remain in that trade. Three of those vessels have been operating in the Alaska oil trade after repaying their CDS under a 1985 Department of Transportation rule. A court decision on January 16, 1987 vacated that rule, but delayed the effective date of its order to July 16, 1987. The fourth repaid its CDS pursuant to an administrative decision issued in 1980 under an interim rule that was subsequently vacated by the court. However, the court allowed the vessel to remain in the domestic trade pending agency reconsideration. This final rule allows those four vessels to remain in the domestic trade in furtherance of the purposes and policies of the Merchant Marine Act, 1936, as amended.

EFFECTIVE DATE: June 22, 1987.

FOR FURTHER INFORMATION CONTACT: Lynne Adams-Whitaker, Chief, Division of Regulations, 400 Seventh Street, SW., Washington, DC 20590, Tel. (202) 366-5181.

SUPPLEMENTARY INFORMATION:

Background

The Jones Act (46 U.S.C. 883) generally provides that all cargo transported in the domestic trade between points in the United States must be carried on vessels built in the United States, documented under United States law and owned by United States citizens. However, U.S. vessels operating in the foreign trade must compete with foreign-flag vessels that have lower operating and construction costs. In an effort to compensate for higher U.S. construction costs, Congress passed Title V of the Merchant Marine Act, 1936, as amended ("the Act"), which authorized the payment of construction-differential subsidy (CDS) for the purpose of building ships in U.S. shipyards to be operated in foreign commerce. 46 App. U.S.C. 1151 *et seq.* The Secretary of Transportation, through the Maritime Administration (MARAD), may pay as much as half the construction costs of such vessels. 46 App. U.S.C. 1152. There is no corresponding subsidy program for vessels constructed by U.S. owners for use in the domestic trade.

In addition, Title VI of the Act authorized the payment of an operating-differential subsidy (ODS) for U.S.-flag vessels manned by U.S. citizens and operated in accordance with U.S. safety standards. 46 App. U.S.C. 1171. By a policy decision, ODS was not paid to CDS-built bulk vessels over 100,000 DWT. Because of the large economies of scale of these vessels, labor costs, which are the main subsidized item under the ODS program, are relatively small in terms of the overall operating cost.

CDS-built vessels are subject to certain restrictions. Under section 506 of the Act, vessels constructed with CDS "shall be operated exclusively in foreign trade or on a round-the-world voyage. . . ." 46 App. U.S.C. 1156. Section 506 of the Act allows CDS vessels to be operated in the domestic trade in the following limited circumstances: (1) On a round voyage from the west coast of the United States to European ports which includes intercoastal U.S. ports; (2) on a round voyage from the Atlantic coast of the U.S. to the Orient which includes intercoastal ports of the U.S.; (3) on a foreign voyage including a stop in Hawaii or an island possession or territory of the U.S. In addition, CDS vessels may be operated in the domestic trade with the consent of the Secretary of Transportation for up to six months in any year under authority of section 506 with the requirement that the vessel owner repay the subsidy on a *pro rata* basis. All domestic trading restrictions for each CDS-built vessel lapse at the end of the vessel's statutory life. Section 9 of Pub. L. 86-318 (74 Stat. 216) sets a 20 year economic life for tankers.

The overall objectives of the 1970 amendments to the Act (Pub. L. 91-469, 84 Stat. 1018) were to provide for a long-range shipbuilding program of 300 ships in the next ten years, a general lessening of dependence on ODS for the liner carriers, and the build up of our bulk carrier fleet in the U.S. foreign commerce. The envisioned shipbuilding program of the 1970 amendments with emphasis on building bulk carriers, including tankers.[1]

Prior to the 1970 amendments, the operating subsidy programs and for the most part the construction subsidy program of the Merchant Marine Act had been confined to liner vessels, which operated scheduled services in foreign commerce under the regulatory supervision of the

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[1] Conf. Report No. 91-1555, H.R. 15424, Oct. 1, 1970. In fact, only 34 petroleum tankers were built with CDS authorized by the 1970 amendments.

Federal Maritime Commission. The Congress, in extending and initially funding the reach of these programs to the unregulated bulk traders (particularly the dry bulk trade), specifically recognized the need to make these vessels "competitive" with foreign flag ships. *See* H. Rep. No. 1073, 91st Cong., 1st Sess., 38 (1969); Merchant Marine Act, 1936, 603(b), 46 U.S.C. 1173(b).

Unfortunately, the governmental program offered to U.S.-flag very large crude carriers ("VLCCs," i.e., tankers over 160,000 DWT) has not enabled them to be competitive in the foreign trade. In 1970, Congress did not foresee, and perhaps could not have foreseen, the drastic changes that would occur in the world oil market. The decline in export of crude oil from the Middle East, in addition to an oversupply of world tankers built since 1970, has been financially devastating for the world tanker market. As a consequence, the two ultra large crude carriers and nine VLCCs constructed with CDS under the 1970 amendments were left with no significant competitive opportunities in the foreign commerce.

The domestic market, however, has not fared as poorly. With the opening in 1977 of the Trans-Alaska Pipeline System, the demand for U.S.-flag tanker tonnage has increased and that demand has not been completely met by the existing Jones Act (domestic) fleet. To alleviate the shortage of suitable Jones Act tanker vessels, MARAD has allowed CDS-built tankers to enter the trade for up to six month periods after repaying the subsidy *pro rata* under section 506 of the Act and in accordance with 46 CFR Part 250.[2] Since 1977, MARAD has approved 43

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[2] 46 CFR Part 250 establishes procedures by which MARAD may temporarily waiver (i.e., for no more than six months in any twelve month period) the domestic trade restrictions on CDS-built vessels over 200,000 deadweight tons (DWT) in the Alaska-Panama trade. Applications for such waiver must be accompanied by information showing that suitable vessels (i.e., those over 100,000 DWT) of a competitor could not be available for the prospective voyages.

such applications for CDS-built tanker service in the Alaska oil trade (of those approvals, 37 were for VLCCs). During 1982 and 1983, approximately six VLCCs per year entered the domestic trade under six month permissions, which was the equivalent of three VLCCs participating in the domestic trade on a full-time basis.

Because of the limited duration and availability of these temporary permissions and the depressed market conditions confronting tankers in the foreign trade, several CDS tanker owners (predominantly those owning VLCCs) applied for permission to enter the domestic market on a permanent basis in exchange for the total repayment of their CDS.

Prior to 1978, requests for permanent repayment were handled *ad hoc*. No hearings were held on these requests and notice of the proposed determinations was not given to the public. However, after MARAD admitted the VLCC STUYVESANT (operated by Seatrain Lines) to the domestic trade, with full CDS repayment, competitors in that trade brought suit challenging MARADs action. The Supreme Court ultimately held that the Secretary's broad contracting powers and discretion to administer the Act encompass the authority to grant permanent entry into the domestic trade to vessels upon repayment of CDS. *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572 (1980).

In 1978, MARAD issued a notice of proposed rulemaking (NPRM) that would have set guidelines for permanent CDS repayment. 43 FR 51045 (November 2, 1978).

Charterers and owners of six CDS-built vessels applied for CDS repayment. On October 15, 1980, MARAD adopted and made immediately effective an interim rule to govern applications for CDS repayment. 45 FR 68393. Under the interim rule, approvals would be granted only for vessels of at least 100,000 DWT, and only in excep-

tional circumstances, after a determination that no favorable opportunities existed for viable employment of the vessel in foreign trade during a protracted period. MARAD was to consider a number of factors in determining whether exceptional circumstances existed.

On November 13, 1980, through an adjudicative decision, issued under the interim rule, MARAD approved the CDS repayment application for the BAY RIDGE, another Seatrain VLCC. MARAD deferred action on the other pending CDS repayment applications. On November 25, 1980, the Independent U.S. Tanker Owners Committee filed a complaint in the U.S. District Court for review of the interim rule and the BAY RIDGE decision, alleging substantive and procedural defects in connection with both actions. The District Court granted summary judgment for defendants on all counts. An appeal was taken.

On appeal, the D.C. Circuit held that MARAD was not legally obligated to issue regulations limiting its discretion and that the interim rule itself did not constitute an abuse of MARAD's statutory discretion. *Independent Tanker Owners Committee* v. *Lewis*, 690 F.2d 908 (D.C. Cir. 1982) [hereinafter referred to as *ITOC* v. *Lewis*]. Nevertheless, the Court vacated the interim rule on procedural grounds. It concluded that the rule lacked a general statement of basis and purpose, as required by the Administrative Procedure Act (5 U.S.C. 551 *et seq.*), to explain MARAD's position on the various issues raised during the rulemaking proceeding. The Court also found that adjudication allowing the BAY RIDGE repayment was procedurally and substantively flawed.

The Court of Appeals remanded the case to the District Court with instructions to vacate the interim rule and to order new rulemaking procedures, and to vacate the approval of the BAY RIDGE application, but to allow the BAY RIDGE to continue in domestic operation pending reconsideration of the BAY RIDGE adjudication.

The Court left to MARAD's discretion whether the new BAY RIDGE decision should await publication of a permanent rule regarding CDS repayment. The Court also left to MARAD's discretion whether to adopt a permanent rule similar to the interim rule so long as the justification for the rule adopted was "clearly and thoughtfully presented in a statement published contemporaneously with the rule". *ITOC* v. *Lewis*, 690 F.2d at 920.

Following the transfer of MARAD to the Department of Transportation, the Department published a new NPRM on January 31, 1983, 48 FR 4408. That NPRM, which was issued by the Secretary, proposed to permit all CDS-built U.S. tanker vessels to enter the domestic trade upon repayment of unamortized CDS plus compound interest. The notice reviewed the entire history of this issue since MARAD first accepted total repayment on the VLCC STUYVESANT and reviewed the comments received on earlier MARAD rulemakings pertaining to total repayment in return for domestic trading privileges. It invited further comment on these issues and assessed the economic impact of allowing the owners/operators of these vessels to determine whether to repay their CDS. The rulemaking concluded that the Government was not in a position to assess, on its own, which vessels should, and which should not, be allowed to meet the needs for additional capacity in the domestic trade. For example, it pointed out that only allowing operators in financial jeopardy to repay their CDS was not consistent with the objectives of the 1936 Act. 48 FR at 4412.

The Department concluded that the marketplace decisions of individual operators would best serve the needs of the fully deregulated domestic tanker trade, provided that those operators that repaid were not given an unfair competitive advantage vis-a-vis the existing Jones Act fleet. *Id.* at 4409-4410.

Accordingly, the Department's proposed rule required repayment of an additional amount consisting of com-

pound interest on the unamortized subsidy from the date of its original receipt. According to the Department's analysis, the addition of this amount, which frequently would exceed the unamortized subsidy itself, would duplicate the financial conditions inherent in a private sector decision to commit any comparable asset to the domestic trade, with an allowance only for its age, by allowing the amortization of the subsidy pursuant to its statutory useful life of 20 years. *See* 48 FR 4408-4414. Since the Government does not otherwise regulate entry of new capacity in the domestic trade, duplicating the conditions ordinarily governing such entry was deemed the most appropriate approach by the Department.[3]

Shortly after the close of the comment period on the NPRM, the Congress took action to prevent temporarily the Secretary from promulgating a final rule. The DOT FY 84 Appropriations Act (Pub. L. 96-78, August 15, 1983) prohibited the enforcement of any rule with respect to the repayment of CDS until 60 days following the promulgation of any such rule. Thereafter, the Commerce Department's FY 84 Appropriations Act (Pub. L. 98-166, November 28, 1983) imposed an additional restriction that prohibited DOT from enforcing any CDS repayment rule until after June 15, 1984. In August 1984, the FY 85 Appropriations Act for Commerce, Justice and State, which provides appropriations for MARAD, imposed yet another restriction. The Act prohibited the Department from enforcing any CDS repayment rule until May 15, 1985 (Pub. L. 96-411, August 30, 1984). Thereafter, Congress considered, but did not extend, these prohibitions.

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[3] It should be noted that damaged foreign-built vessels may be acquired and reconstructed for use in the domestic trade under the Wrecked Vessels Act without prior government approval, provided a specific amount is expended in the reconstruction (i.e., three times their salvage value). 46 App. U.S.C. 14.

On May 7, 1985, the Department published in the Federal Register a final rule which allowed any owner of a tanker built with CDS to repay its subsidy (with interest) and consequently obtain a permanent removal of domestic trading restrictions. (50 FR 19170). The amount of repayment included the unamortized CDS on the vessels plus compounded interest on that amount. The interest rate, to be used for computational purposes, was to be the rate at which the original Title XI obligation was made or the Title XI long-term bond rate at the vessel's delivery. The final rule included a one-year time limit after the rule's effective date during which total CDS repayment had to be made. *See* 46 CFR 276.3 That time limit was from June 6, 1985 to June 6, 1986. During that period, three VLCCs repaid their CDS: the ARCO INDEPENDENCE (262,400 DWT), ARCO SPIRIT (262,400 DWT), and the BROOKLYN (226,200 DWT). The total amount of CDS repaid by these ships was $105.8 million. Those ships are now operating in the domestic trade.

The final rule was challenged in court. Initially, the District Court upheld the rule. 620 F. Supp. 1289 (D.D.C. 1985). However, on January 16, 1987, the Court of Appeals for the District of Columbia Circuit held that the Secretary of Transportation violated section 553(c) of the Administration Procedure Act by adopting a final rule which did not contain a statement of basis and purpose giving an adequate account of how the rule served the objectives of the Act and why alternatives were rejected in light of them. *Independent U.S. Tanker Owners Committee* v. *Dole*, 809 F.2d 847 (D.C. Cir. 1987) [hereinafter referred to as *IOTC* v. *Dole*]. The court found that the Secretary's failure to provide an adequate statement of basis and purpose was arbitrary and capricious. The court vacated the rule, but withheld issuance of its mandate until July 16, 1987 "to avoid further disruptions in the domestic market and to allow the Secretary to undertake further proceedings to address the problems of the merchant marine trade." *Id*

at 855. Under the Court's decision, as of July 16, 1987, the present rule will be vacated and conditions will be returned to the *status quo ante*, before the CDS repayment rule took effect, subject to any further action that the agency may have taken in the interim.

In response to the *ITOC* v. *Dole* decision, MARAD published a notice of proposed rulemaking in the Federal Register (52 FR 12199, April 15, 1987) with a closing date of May 15 for comments. That NPRM proposed to reaffirm the allowance of the repayment of CDS, with interest, and rescission of the domestic trading restriction for tankers that applied to and were approved by MARAD pursuant to the 1985 rule between June 5, 1985 and June 6, 1986. The approved applications were for the ARCO INDEPENDENCE, ARCO SPIRIT and BROOKLYN. Further, the NPRM proposed to reaffirm the allowance of the repayment of CDS, with interest, and rescission of the domestic trading restrictions for the BAY RIDGE, which was approved to repay its CDS in November 1980. Since the terms of repayment for the BAY RIDGE were different from the other three VLCCs (i.e., it repaid in accordance with conditions stated at the time of repayment of principal and interest), the NPRM imposed the same conditions on the BAY RIDGE that were imposed in 1980.[4]

The proposed rule differed from the 1985 CDS repayment rule in that it did not authorize all vessels that were built with CDS to repay. Rather, it was limited to those

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[4] By letter dated March 16, 1987, counsel for the BAY RIDGE requested that a proceeding on the BAY RIDGE should be conducted independently of proceedings with respect to the three vessels which repaid CDS pursuant to the 1985 repayment rule. The court in *ITOC* v. *Lewis* specifically left to MARAD's discretion whether or not the BAY RIDGE decisions should await publication of a permanent rule governing repayment applications. MARAD has decided that it is appropriate to consider the BAY RIDGE in this rulemaking, since it would operate in the same domestic trade as the other three vessels at issue and involves many of the same issues.

vessels that were already operating in the domestic trade on a full-time basis pursuant to prior approvals that had been invalidated by the courts. The proposed rule imposed the same terms and conditions on the three tankers that repaid during the one-year window as were required in the 1985 CDS repayment rule.

The proposed rule also differed from the 1985 rule in that the proposed rule was issued by order of the Maritime Administrator. By delegation, the Maritime Administrator is authorized to administer and carry out the Act, except for specific authorities delegated to the Maritime Subsidy Board (e.g., certain contractual functions, *see* 49 CFR 1.4(k)(1), 1.67). 49 CFR 1.45(2), 1.66(e). While the Maritime Subsidy Board is responsible for awarding and amending CDS contracts, the Maritime Administrator is responsible for administering CDS contracts. 49 CFR 1.4(j)(2). Inasmuch as only administration of the CDS contracts to the ARCO INDEPENDENCE, ARCO SPIRIT, BROOKLYN and BAY RIDGE are involved, the Maritime Administrator has the authority by delegation from the Secretary to issue this rule.

This final rule confirms the repayment of CDS, with interest, and rescission of the domestic trading restrictions for the ARCO INDEPENDENCE, ARCO SPIRIT, BROOKLYN and BAY RIDGE.

Summary of the Rationale for this Rulemaking

This rule provides a means to further the purposes and policies of the Merchant Marine Act, 1936, as amended. There is a tremendous overcapacity of VLCCs in the U.S. foreign trades. On the other hand, prior to the 1985 rule, there had been a shortage of VLCCs in the U.S. domestic trades, which has led to frequent approvals of temporary permissions under section 508 of the Act for the ANS-Panama trade. This rule allows four VLCCs that have not been able to find employment in the foreign trade to

move permanently from the foreign to the domestic trade, upon the repayment, with interest, of the unamortized portion of the subsidy provided by the U.S. Treasury for their construction. It is recognized that this action may possibly adversely affect, though not to the degree claimed by opponents, vessels and seamen now in the domestic trade. The net possible adverse impact is outweighed by the resulting stronger, more viable merchant marine.

The primary purpose for permitting the four VLCCs to enter the domestic trade is to allow the employment of the most suitable vessels for a more well-balanced U.S. tanker fleet. The 1936 Act requires consideration of the impact of this action on suitability of vessels both for day-to-day commercial operations and military mobilization needs. In the absence of the rule, a significant portion of the domestic trade—the transport of crude oil from Valdez, Alaska to Panama—would face a shortage of vessels that can take advantage of inherent economies that larger ships (resulting from the length of haul) enjoy in the market. The rule furthers day-to-day commercial operations by allowing more suitable ships in the Alaska-Panama trade. As for military mobilization needs, the Navy has certified the suitability for military purposes of each of the four vessels the rule would allow into the domestic trade, and the fleet as a whole will be suitable for military needs.

Allowing the four VLCCs into the domestic trade also results in a better balance of large, medium, and handy-sized tankers in the domestic fleet. Further, it avoids the possible lay-up or scrapping of these generally more modern, more efficient vessels. Instead, a few smaller vessels may possibly be forced into extended lay-up or scrapped. As a result of the rule significant oil transport cost savings will be effected, which, based on the Regulatory Impact Analysis, could total as much as $386-542 million.

MARAD recognizes that rule will not increase the participation of U.S.-flag vessels in the foreign trade. However, because of changes in the pattern of world demand for crude oil, and reductions in demand for VLCCs for the foreign trade, it is extremely unlikely that these vessels would be operating in the U.S. foreign trade in any event. Absent the rule it is likely that these vessels would be forced into long-term lay-up and concomitant waste or scrapped.

MARAD also recognizes that this rule possibly will result in the lay-up or scrapping of a few smaller sized crude carriers sooner than would otherwise occur and that additional seamen possibly will become unemployed as a result. Opponents of this action generally overstate these effects. MARAD believes that six Jones Act tankers may possibly be laid up or scrapped as a consequence of this rule versus possible lay-up or scrapping of four CDS VLCCs if the rule is not adopted. MARAD also estimates that possibly between 100 and 225 seafarers fay lose employment as a result of the rule. (Approximately 300 seafarers could lose employment because of the possible displacement of six handy-sized tankers, but this must be adjusted to account for losses due to less use of the VLCCs. Since factors other than CDS repayment (including the vessels' size, age, source of power, crew requirements, pollution equipment and market conditions) will have an impact on the prospects for employment of Jones Act tankers, it is not clear that they would be employed in any event. MARAD believes the direct benefits of the rule to the fleet as a whole outweigh these possible adverse effects on other Jones Act tankers and seafarer employment.

Finally, regardless of the outcome of this proceeding, the four VLCCs would be entitled to enter the domestic trade automatically under the Act at the end of their statutory (20 year) useful life, at which time their CDS will have been fully amortized. Thus, the BROOKLYN

would be eligible to enter the domestic trade in 1993, the ARCO INDEPENDENCE and ARCO SPIRIT in 1997 and the BAY RIDGE in 1999. Thus, this rule merely serves to accelerate their entry into the domestic fleet, with the recovery of the unamortized subsidy for the Treasury, plus compound interest on that amount. Thus, the vessels are effectively placed on the same footing as they would be at the end of the statutory amortization of their CDS.

The owners or charterers of the four VLCCs must have believed that it was worthwhile to repay CDS in order to participate in the domestic trade. Obviously, those companies concluded that they would make a reasonable return on their investment (i.e., CDS repayment) through their domestic operations, despite the fact that the domestic trade restrictions would be lifted on their tankers in six to twelve years.

By the close of the comment period, MARAD had received over 100 comments in support of or opposition to the issuance of this rule from members of Congress, a Federal agency, operators of both CDS-built and Jones Act vessels, environmental groups, a fishermen's association, a seafarer's union, individual seafarers, a shipbuilders' organization, two shipyards, and the State of Alaska. MARAD also received several comments after the close of the comment period, which were placed in the docket. MARAD now turns to addressing the comments that it has received.

Discussion of the Comments Received

1. Purposes and Policy of the Merchant Marine Act

Several commenters argued that this rule does not further the purposes and policies of the Act. Other commenters agreed with MARAD's assessment that this rule does further the objectives of the Act.

MARAD believes that the rule will further the goals of the Act. The preamble to the Merchant Marine Act,

1936, as amended, states that the intent of the Act is "[to] further the development and maintenance of an adequate and well-balanced American merchant marine, to promote the commerce of the United States, to aid in the national defense. . . ." The specific goals of the Merchant Marine Act, 1936, as amended, as set out in section 101 of the Act, are to foster the development and encourage the maintenance of an American merchant marine that is:

> (a) sufficient to carry out its domestic waterborne commerce and a substantial portion of the waterborne export and import foreign commerce of the United States and to provide shipping service essential for maintaining the flow of such domestic and foreign waterborne commerce at all times, (b) capable of serving as a naval auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States, insofar as may be practicable, (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel, and (e) supplemented by efficient facilities for shipbuilding and ship repair. 46 App. U.S.C. 1101.

MARAD believes that this final rule, which allows the four CDS-built very large crude carriers ("the four VLCCs") to remain in the domestic trade, will benefit the domestic water-borne commerce by allowing vessels that are the most "suitable" for the Alaska-Panama oil trade to serve that trade, and will result in a more "well-balanced" American merchant marine. The fact that the four VLCCs have been consistently employed in that trade since their repayment of CDS (except for the recent lay-up of the BAY RIDGE) demonstrates their suitability for and benefit to that trade, as does the history of six month permissions issued pursuant to section 506 of the Act. Although originally built to operate

in the foreign trade, the four VLCCs are not competitive in that trade. If not allowed to operate in the domestic trades, the four VLCCs would likely be laid up and possibly scrapped.

a. Suitability of the Four VLCCs for the Domestic Trade

(i) Some commenters (predominantly owners of tankers in the Jones Act trade that would have to compete with the four VLCCs either directly or indirectly) contended that the four VLCCs are not suitable for the domestic trade and that allowing these four VLCCs to remain in the trade will disrupt the domestic tanker fleet. Atlantic Richfield Company (ARCO) and American Petrofina disagreed, arguing that the four VLCCs will benefit the domestic tanker fleet overall.

A key purpose for allowing the four VLCCs to remain in the domestic trade is to have a sufficient U.S. domestic fleet "composed of the best-equipped, safest, and most suitable types of vessels" for that trade. Suitable vessels for the Alaska-Panama trade are defined by MARAD regulation as tank vessels of at least 100,000 DWT engaged in the carriage of Alaskan oil. 46 CFR 250.2(h). Suitability, in the context of the overall goals of the Act, means suitability of particular vessels for the U.S. commerce, and suitability of vessels to serve as naval auxiliaries (for discussion of suitability of the four VLCCs as naval auxiliaries, see section 1.[5]

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[5] "Suitability" is discussed in section 101 of the Act (46 U.S.C. 1101(d) in terms of "best-equipped, safest and most suitable types of vessels . . . ." It is also referred to in other sections of the Act in the context of military usefulness, as in section 501 of the Act. (46 U.S.C. 1131, 1152, *see also* 46 U.S.C. 861, 1125) and 46 CFR Part 250. Participation by Vessels Built with Construction-Differential Subsidy in the Carriage of Oil from Alaska in the Domestic Trade.

Tanker demand in the ANS trade depends on ANS oil production and the distribution of the oil. As production increases, so does the amount of tonnage needed to carry the oil. However, the increase in demand for tankers may not be proportional to oil production if there is also a change in the distribution of the oil.

Several factors contribute to the sutability of the four VLCCs for the ANS-Panama trade. VLCCs are more suitable for long-haul, high volume trades than smaller tankers, due to economies of scale. That is, tanker operating costs do not rise as fast as cargo volumes. Studies of optimal ship size have shown that optimal ship size is determined by minimizing costs per ton at sea and in port. (In port, costs per ton increase with ship size; at sea, however, costs per ton decline with ship size). J.O. Jansson and D. Shneerson, "The Optimal Ship Size," *Journal of Transport Economic and Policy*," *Journal of Transport Economic and Policy*, 217, 223 (Sept. 1982). VLCCs are more suitable for the Alaska-Panama leg of the ANS trade because of the length of the voyage (approximately 4,950 miles). The at-sea time is significantly longer than any of the other legs of U.S.-flag oil shipments in the U.S. Another factor contributing to the suitability of the VLCCs for the Panama leg is the deep-draft at the Puerto Armuelles terminal in Panama, which can accommodate those larger tankers. Because of these factors, VLCCs are able to carry oil in that trade more efficiently than smaller tankers under 100,000 DWT.

Historically, VLCCs have carried the majority of oil from Alaska to Panama. During 1986, about half the full-time equivalent tanker employment in the Alaska-Panama trade was for vessels from 200,000 DWT to 265,000 DWT; most of the other half was for VLCCs from 170,000 DWT to 190,000 DWT. A small percentage was carried by tankers from 110,000 DWT-137,000 DWT, while only 0.6 percent in 1986 was carried by vessels under 100,000 DWT. (Historically, the share car-

ried by tankers under 100,000 DWT has been no more than six percent.) Even prior to the 1985 CDS repayment by three of the VLCCs, the Valdez-Panama trade was overwhelmingly dominated by tankers over 100,000 DWT. Many of these were CDS-built VLCCs operating under six month permissions in the domestic trade.

The Regulatory Impact Analysis (RIA) also indicate trends in the distribution of oil by trade and by vessel tonnage pertinent to this issue. It indicates that since the permanent entrance of the three CDS-built VLCCs in the domestic trade (i.e., from 1985-1986), the percentage of full-time equivalent tanker employment for VLCCs over 200,000 DWT in the Alaska-Panama trade has risen considerably, and employment by vessels under that tonnage range has decreased correspondingly.[6] It appears therefore that the trend of large VLCCs carrying the majority of Valdez-Panama ANS trade will continue.

(ii) Several commenters argued that the legislative history of the Act indicates that the term "suitability" in section 101 refers solely to military suitability, and that the four VLCCs are not suitable for military use.

MARAD agrees that usefulness of a vessel for national defense or military purposes is one factor to be considered in determining whether a vessel is "suitable" under section 101. In fact, the four VLCCs at issue have been certified by the Navy as being so useful. Section 501 of the Act establishes requirements for approval of applications by proposed ship purchasers for CDS. One of the requirements for approval in section 501 is that the Secretary of Transportation must determine that the "plans and specifications call for a new vessel which will . . . be suitable for use by the United States for national defense or military purposes in time of war or national emer-

[6] It should be noted, however, that in some years, the full-time equivalent of three VLCC's operated in the ANS trade under six month waivers pursuant to 46 CFR Part 250.

gency . . ." section 501(b) requires the Secretary of Transportation to submit the plans and specification for the proposed vessel to the Navy Department "for examination thereof and suggestions for such change therein . . . in order that such vessel shall be suitable for economical and speedy conversion into a naval or military auxiliary, or otherwise suitable for the use of the United States Government in time of war or national emergency." 46 App. U.S.C. 1151. If the Secretary of the Navy approves the plan, the approval shall be certified to the Secretary of Transportation.

In a letter dated June 22, 1971 to the Assistant Secretary for Maritime Affairs, Department of Commerce, the Navy Department certified the plans and specifications on the same ship design as the BROOKLYN and BAY RIDGE. In that letter, the Navy Department certified "that the proposed ships are suitable for the use of the United States Government in time of war and national emergency." The Navy Department suggested certain features to enhance the suitability of the tankers, which subsequently were included in the plans. On July 3, 1973, the Navy Department approved the plans for the design of the two ARCO VLCCs, and certified that they, too, were suitable for use by the government in time of war or national emergency. The Navy again suggested certain features that were in accordance with Military Sealift Command standards. That letter also noted that the design did not meet basic environmental standards expected to be established for oil transport vessel, and, thus, the Navy requested that the final contract plans and specifications be resubmitted to the Navy for review. Those plans were subsequently resubmitted to Navy, and received their approval. Thus, the CDS-built VLCCs were built with the approval of the Navy as suitable for use by the government pursuant to section 501 of the Act.

Further, the word "suitable" as used in section 101(d) of the Act, (i.e., "(d) composed of the best equipped,

safest and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel, and . . .") is not limited to suitable vessels for use in time of war or national emergency or for economical and speedy conversion into naval or military auxiliary. The word also addresses the suitability of vessels for commercial trading purposes. Otherwise section 101(a) of the Act loses its meaning and section 101(b) becomes redundant.

MARAD has historically employed the term "suitable" in referring to vessels that meet the requirements set out in section 211(c) of the Act. Thus, the formal findings which are made by the Maritime Administrator in his determination as to whether vessels meet the requirements of section 211(c) employ the word "suitable." As used by the Maritime Administrator in this context "suitable" refers primarily to commercial characteristics as described in section 211(c) which would enable a vessel to operate efficiently in commercial operations.

Further, the legislative history to the Act indicates that "suitable vessels" include those that are "modern" and "mobile," [7] "properly equipped," and "of adequate speed and efficiency" [8] with "reduced fuel consumption." [9] The legislative history further acknowledges that "larger and faster ships might be more efficient, not only in developing foreign commerce, but also more desirable as naval auxiliaries." [10]

MARAD acknowledges the importance of the national defense objective of the Act, which is clearly an essential

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[7] House Report No. 1277, *The Merchant Marine Bill* 1935, 74th Cong., 1st Sess. 7 (1935).

[8] House Document No. 118, 74th Cong., 2nd Sess. 35 (1935).

[9] *See, e.g.*, Hearings on S. 2582, *Merchant Marine Act*, 1935, Committee on Commerce, United States Senate, 74th Cong., 1st Sess. 120 (1935).

[10] Senate Report No. 1721, 74th Cong., 2d Sess., April 3, 1936.

feature of the Act.[11] Since the four VLCCs have been certified by the Navy as being useful to the government in times of war or national emergency, MARAD believes that they are "suitable" vessels as defined by the Act and its legislative history.

b. Well-Balanced Fleet

(i) Several commenters also argued that the domestic fleet will not be well-balanced under this rule, but will be top-heavy with VLCCs at expense of 12 handy-sized tankers. Other commenters believed that VLCCs are necessary to provide a combination of types of ships for the varied segments of the domestic oil trade.

The preamble to the Act states that the Act is intended to "further the development and maintenance of an adequate and well-balanced American merchant marine, to promote the commerce of the United States. . . " MARAD believes that this rule furthers those goals and that to be well-balanced, the U.S. fleet must be composed of a mix of vessels that are suitable for serving particular trades. While VLCCs are more suitable than smaller, handy-sized tankers for the long-haul, high volume crude oil trades, e.g., Valdez-Panama, handy-sized tankers (i.e., approximately 27,500 DWT) are better suited than VLCCs for U.S. coastwise trades.

During 1986, all Jones Act VLCCs were employed in the ANS-Panama and ANS-West Coast crude trades. Such temporary lay ups can be attributed to seasonality of the coastwise product trades. Thus, the current Jones Act tanker fleet, including the repayment VLCCs, appears to have an adequate mix of VLCCs and smaller tankers to serve the long-haul crude oil trades as well as the highly seasonal coastwise trades. In fact, allowing the four VLCCs to remain in the domestic trade makes the domestic fleet better balanced than it would be without these vessels in the trade. Without the four VLCCs

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[11] House Report No. 1950, 75th Cong., 3rd Sess., 13 (1976).

being employed full-time in the Alaskan oil trade, it is likely that there would not be sufficient small tanker capacity available to meet peak seasonal demand in the upcoast (U.S. Gulf/East Coast) trade.

Further, only six percent of the domestic tanker deadweight tonnage (a total of twelve tankers of 649,609 DWT) were in long-term lay-up or temporarily idled as of February 19, 1987. Of those, three tankers (totaling 146,600 DWT) are over 20 years old. The remaining nine tankers include the PRINCE WILLIAM SOUND (123,400 DWT) which was in repair, and smaller tankers that could serve in the Alaska-Panama trades, although at much higher cost per ton delivered than the VLCCs currently operating in that trade. As of May 12, 1987, there were 23 inactive U.S.-flag domestic tankers. Of these, seven (312,000 DWT) were laid up, 14 (636,600 DWT) were temporarily idled and two (204,000 DWT) were casualties. The PRINCE WILLIAM SOUND recently was chartered for six months, the ASPEN was repaired and is scheduled for loading in Valdez on June 12, 1987. The Navy has announced it will purchase the SPIRIT OF LIBERTY for the Reserve Fleet. The CHESAPEAKE has been approved for foreign transfer. The remaining tankers could be sufficient to offset the loss of the three latest CDS-repayment VLCCs from the ANS-Panama trade, although at a much higher cost per delivered ton of crude oil. However, if the repayment VLCCs were removed from the Valdez-Panama trade, and replaced by laid-up tonnage, there would be severe shortages of tanker services (at least through 1989) to meet seasonal peak demands in domestic petroleum trades.

Comparing the February lay-up list to the May list shows an addition of 11 ships.[12] Some of this increase

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[12] Tankers of less than 8,000 DWT and chemical tankers were not included in calculating these figures. The RLA lists the laid up, idle, and casualty tankers as of May 22, 1987.

can be attributed to the delivery of the 209,000 DWT EXXON LONG BEACH as there has been little change in the employment of the four CDS-repayment VLCCs during this period. Although the BAY RIDGE has recently been laid up, MARAD believes there are still adequate employment opportunities in the Valdez-Panama trade. (See RIA).

(ii) Shell Refinery and Marketing Company commented that the domestic fleet will not be well-balanced with the four VLCCs in the trade. The basis for this contention was Shell's statement that it was given contractual notice of terminaiton of their subcharters for the B.T. ALASKA and B.T. SAN DIEGO, two VLCCs which will be idled as of August 4, 1987. Shell argued that its two proven "most suitable" tankers and other Jones Act vessels will be unemployed and possibly scrapped in order to accommodate and reward those who unwisely invested in CDS vessels.

While some realingments of the tanker fleet has occurred following CDS repayment, that realignment has resulted from shippers seeking to charter suitable, cost-effective tankers (see RIA). That shippers have kept the four VLCCs and the Shell vessels employed since the four VLCCs repaid their CDS indicates that they are suitable for the Alaska-Panama trade. The recent lay-up of the BAY RIDGE and notice of termination of the Shell vessels' charters do not necessarily indicate at this point anything beyond anticipated temporary idle tonnage. It is reasonable to believe that if in fact these vessels are among the most suitable tankers, they will be employed in the future and thus contribute to a well-balanced U.S. flag fleet.

(iii) Several commenters argued that the rule will cause the U.S. fleet to be unbalanced on the basis that the U.S. foreign trade fleet will be less adequate because the four VLCCs will not operate in that trade.

The U.S.-flag tanker fleet engaged in the foreign trade will in all likelihood be unaffected by this rulemaking. The four repayment VLCCs were built for the foreign trades, but because of changes in the geographic pattern of U.S. foreign oil trades and continually depressed market conditions for VLCCs in foreign trades, U.S.-flag VLCCs have been unable to compete effectively in these trades (see RIA and section 1.d.(i) below). If the four VLCCs were removed from the domestic trade, they would probably not be employed in the U.S. foreign trades. They would be laid-up or more likely, eventually scrapped. The agency has not ignored the objective of fostering a fleet capable of carrying a substantial portion of U.S. waterborne export and import foreign commerce, but the reality is that this rulemaking will not discourage or enhance that objective.

c. Impact on Shipyards and Shipbuilding

(i) Several commenters argued that the rule will have a negative effect on U.S. shipyards, in opposition to the goals of the Act. Some commenters stated that CDS repayment has already destabilized the domestic tanker industry and, thus, discouraged shipbuilding. Some commenters also believed that the rule will particularly discourage the building of militarily useful handy-size tankers. Other commenters believed that domestic construction has and will continue to decline, due to factors other than CDS repayment.

One of the objectives of the Act is to encourage the development of a merchant marine fleet "supplemented by efficient facilities for shipbuilding and ship repair." While this rulemaking will not actively promote this goal, it also will not have a significant adverse effect on U.S. commercial shipbuilding. MARAD acknowledges that future shipbuilding prospects with or without this rule do not appear positive. Even without CDS repayment, as discussed elsewhere, the growth prospects for the domes-

tic petroleum trades are not sufficient to require the construction of additional tanker capacity.

No orders for the construction of unsubsidized tankers over 100,000 DWT were placed between April 1976 and August 1984. On August 27, 1984, EXXON placed an order for construction of two 209,000 DWT tankers in the United States for employment in the ANS trade. Two foreign-flag tankers over 100,000 DWT were rebuilt in the United States for the ANS crude oil trade in 1981 and 1983 under the Wrecked Vessel Act (46 U.S.C. 14). Under this Act, foreign-built vessels that are wrecked off the U.S. coast are eligible to enter the U.S. domestic trade provided the vessel is purchased by a U.S. citizen and rebuilt in the United States at a cost that is at least three times the appraised salvage value. The first vessel, the OVERSEAS BOSTON (123,700 DWT), was rebuilt in 1981 and the second vessel, the OGDEN COLUMBIA (136,000 DWT), was rebuilt in 1983.

Full-time operations of the three additional VLCCs in the ANS trade following the 1985 rule did not significantly affect the total capacity available. VLCC capacity in the ANS trade following the three most recent paybacks is virtually the same as it was prior to the 1985 rule, when six VLCCs operated for several years in the ANS trade on six-month waivers. In fact, the 1985 entry stabilized domestic tanker markets because the proportional payback required for waiver did not fully offset capital cost advantages of CDS tankers, and any suitable non-CDS tanker could block the granting of a waiver even if its unemployment was due solely to the insistence on unreasonable rates.

Removal of the repayment VLCCs from the domestic trade would not increase construction of militarily useful, handy-sized tanker in U.S. yards for the following reasons. Because those smaller tankers are not suitable for ANS-Panama trade, shortages of tanker tonnage in

that trade (following removal of repayment VLCCs) would probably be met by the granting of six-month waivers for CDS-built VLCCs, and/or by activating laid up tankers. However, it is unlikely that new VLCCs would be built for this trade in any case. In addition to the high cost of construction and the long lead time before delivery, the ANS-Panama trade is expected to decline in the 1990s. It is unrealistic to expect any investment in new tankers for a market in which capital would have to be amortized over a 5-10 year period. Thus, allowing the four CDS-Built VLCCs to remain permanently in the domestic Jones Act fleet will have little effect on the amount of domestic tanker construction.

(ii) The Shipbuilders Council of America asserted that withdrawal of the rule would have a positive impact on West Coast ship repair facilities, because smaller and more numerous tankers presently in lay-up would replace the VLCCs. These smaller tankers would be repaired in domestic yards.

MARAD acknowledges that a few smaller, less efficient tankers might remain fully employed in the ANS trade if the four VLCCs were not allowed to remain in the domestic trade, with some additional repair opportunities for shipyards. However, many of the laid up tankers are nearing the end of their statutory useful life and several are older. Thus, opportunities for ship repair facilities would decline as these older tankers are scrapped.

d. Impact on the Foreign Trade Fleet

(i) A number of commenters argued that removing the four VLCCs from the foreign trade will reduce needed tonnage in that trade. Other commenters insisted that the four VLCCs cannot compete in the foreign trade.

One of the goals of the Act is to encourage the development and maintenance of a merchant marine sufficient

to carry "a substantial portion of the waterborne export and import foreign commerce of the United States. . . ." 46 U.S.C. 1101(a). The Court of Appeals criticized the previous CDS repayment rule for its "dubious proposition that the fleet will remain able to carry out 'a substantial portion' of foreign commerce . . . *ITOC* v. *Dole*, 809 F.2d at 853 (D.C. Cir. 1987). However, the Court also noted in a footnote:

It may be, of course, that present conditions in the world shipping market make it impossible for the Secretary to find a way to meet all of the statutory objectives. If this a problem, she should discuss it frankly and directly when she considers which measures to adopt in light of the objectives explicitly set out in the Act. *Id.* at 854, n.4.

While this rulemaking will provide a domestic tanker fleet that is: (1) Sufficient to carry the domestic waterborne commerce of the United States and (2) composed of the "best equipped, safest, and most suitable types of vessels," MARAD acknowledges that it would not increase or decrease the U.S.-flag share of the water-borne export and import bulk foreign commerce of the United States.

The U.S.-flag foreign trade tanker fleet currently consists of 26 CDS-built tankers totaling three million deadweight tons, including four VLCCs and two ULCCs. (This excludes the four VLCCs that are the subject of this rulemaking and three CDS-built integrated tug-barges, but includes two CDS-built ore-bulk-oil carriers built with CDS.) This tonnage is insufficient to carry a substantial portion of the U.S. bulk foreign commerce. The four CDS-built VLCCs and two ULCCs (ultra large crude carriers) are currently laid up. Only one of the CDS-built tankers under 100,000 DWT is laid up. Seven of those tankers are employed in the foreign trade, while the remaining 12 tankers are under charter to the Military Sealift Command (6) or are employed in the preference trades (6) carrying Strategic Petroleum Reserve oil.

While the intent of MARAD's CDS and ODS programs was to provide a basis for a U.S.-flag fleet that is sufficient to carry a substantial portion of our bulk import and export trade, the assumptions of those programs were not met for VLCC tankers and most of these tankers built under the 1970 program are not competitive in the international market. Moreover, even with the benefits of CDS, the capital costs of CDS-built VLCCs exceed those of comparable foreign-built tankers. In addition, provision for full ODS, as some suggest, would be exorbitant, whether it included or excluded capital cost differentials. Full subsidy would require approximately $5 million annually per ship. There would be no incentive for efficient operation and the Government would become the guarantor of profitable operation. Moreover, the trade ramifications of such a massive open-ended subsidy could prove totally counterproductive at a time when the United States is seeking to remove other anticompetitive trade measures by our trading partners. The United States is neither required to make such expenditures nor would it be sound policy.

The United States currently imports approximately 6.0 million barrels per day of crude oil and refined product, of which only three percent is carried on U.S.-flag tankers. Further, a substantial portion of our crude oil imports—approximately 45 percent—is received from nearby sources including Canada, Mexico, Venezuela and the Caribbean region. The CDS-built VLCCs are unsuitable for these nearby import trades. Approximately 32 percent of U.S. crude oil imports are received from the distant Arabian Gulf and North Sea regions for which VLCCs would be suitable. (However, as noted below, U.S. ships cannot compete profitably in that trade.) In contrast, ten years ago U.S. crude oil and refined product imports averaged 8.8 million barrels per day. Only 14 percent of our crude oil imports were received from nearby sources while over 40 percent of our oil imports

were received from the Arabian Gulf and North Sea regions.

During the last year, there has been an increase in oil exports from the Arabian Gulf region and a corresponding rise in demand for VLCCs in the international trade. Despite this increase, it is unlikely that the U.S.-flag share of U.S. oil imports would increase, due to an oversupply of tonnage in the world tanker fleet and the higher cost structure for U.S. tankers.

According to the Tanker Review in the May 1987 *Lloyd's Shipping Economist*, "tanker owners' hopes for a more sustained period of improvement have quickly evaporated. Once again they are suffering the consequences of a sharp but transitory upturn in the demand for tankers. This had effectively halted the process of overall fleet contraction during 1986 and actually caused an increase in the size of the active oil carrying fleet during the year, so that the subsequent downturn in oil liftings left the market severely overtonnaged and, by March 1987, charter rates for most vessel categories had fallen back to the distressed levels witnessed during the early 1980s." The International Association of Independent Tanker Owners (Intertanko) warned in its 1986 annual report that the severe imbalance in the world's tanker market could worsen over the next couple of years unless the rate of scrapping accelerates. Intertanko, whose members account for about 70 percent of the world's independent tanker fleet, notes that last year's newbuilding orders at 11.5 million DWT reached the highest level since 1979 and that by the end of 1988, the tonnage surplus is projected to rise to about 30 million DWT if the rate of demolition does not increase.

The amount of idle capacity in the over 200,000 DWT size class represents more than 26 percent of the available tonnage in that class. Therefore, given the relative higher operating costs for U.S.-flag tankers and the

amount of idle tonnage over 200,000 DWT in the world fleet, it is very likely that the four VLCCs that are the subject of this rulemaking would be laid up or scrapped if they are required to leave the domestic trade.

In fact, of the nine VLCCs and two ULCCs built with CDS under the 1970 program, none has had any significant employment in the foreign commercial trades, other than occasional shipments of oil to the Strategic Petroleum Reserve, which are reserved to U.S.-flag carriage. The BAY RIDGE, which repaid its CDS in 1980, has been operating actively in the domestic trade since that time, as has the STUYVESANT. The other three VLCCs operated in the domestic trade regularly under six month waivers under Part 250 (a total of 17 times since 1978) and a full-time basis since they repaid CDS. Thus, the deployment of these four VLCCs to the domestic trade would have no impact on U.S.-flag tanker presence in foreign trades. If anything, by precluding their scrapping, the rule enhances the possibility, concededly remote, that the vessels could be used in the foreign trade if market conditions change.

The D.C. Circuit criticized the statement in the preamble to the 1985 rule that, while the rule would not enhance U.S. participation in the foreign trade, the repaying vessels would be available if opportunities should arise in that trade. The court was of the view that if total U.S. tonnage decreased to the level required by the domestic trade as a result of the rule, there would not be capacity available to carry a "substantial portion" of foreign oil. 809 F.2d at 853. However, it is not CDS repayment that is causing or hastening the "natural tendency" of the fleet to shrink to the level required to serve the domestic demand, it is the dearth of profitable opportunities in the foreign trade due to factors unrelated to CDS repayment.

(ii) Some commenters disagreed with MARAD's assessment that the four VLCCs could not compete in the

foreign trade. These commenters argued that there were opportunities for U.S.-flag VLCCs in foreign trade in 1986. The comments of American Trading Transportation Company, Inc., and others contended that the four VLCCs could be competitive in the foreign trade by using the refund of money they used to repay CDS to subsidize their vessels in the foreign trade until international market conditions improved. Further, a commenter stated that ARCO and American Petrofina could use a portion of these funds to re-engine their VLCCs from steam to diesel, which would result in savings in fuel oil consumption and manning costs, thus reducing the operating cost differential between the ARCO and foreign-flag VLCCs.

The breakeven rate for the ARCO VLCCs in the Persian Gulf-U.S. Gulf trade, the predominant market for VLCCs in U.S. foreign trade, is $10.75/long ton or WS 66 fully loaded, excluding capital costs; or $12.65/long ton or WS 78, including capital costs.

The highest publicly reported voyage fixture for 200,000-300,000 long ton shipments in the Persian Gulf-U.S. trade in 1986 was $7.70/long ton or WS 47.5 (Lloyd's Maritime Data Network), well below the breakeven rate excluding capital cost for the ARCO VLCCs in that trade. American Petrofina (which charters the BROOKLYN) in its comments calculated that it would incur annual operating losses of $6-6.7 million per ship to engage in the foreign trade, in addition to $6 million for charter hire which is payable even if the ship is not employed. Since it would cost approximately $8 million to lay up one of its ships, American Petrofina stated that it would not be likely that its ships would enter the foreign trade. Thus, it appears that the repayment VLCCs would have generated substantial operating losses if they had operated in U.S. foreign trades in 1986.

MARAD believes that, even if it refunded the CDS payback money, it could not force those that repaid to

use the money to re-engine their VLCCs. In repaying their CDS, the VLCC owners made the business decision that they could operate their tankers more profitably, even in light of the cost of repayment, in the domestic trade than in the foreign trade. Even if the VLCCs were re-engined, their operating and capital costs would be higher than that of comparable foreign-built VLCCs.[13] The oversupply of VLCCs in the world market has resulted in rates that could not possibly compensate the four VLCCs for their costs. (American Petrofina predicted it would incur annual operating losses of $6 to $6.7 million per ship to engage the foreign trade.) Further, as American Petrofina noted, not one of the four VLCCs has had a single commercial foreign trade voyage in the last six years.

Hence, MARAD continues to believe that allowing the four VLCCs to remain in the domestic trade is the best option for their continued viable operation. To force the four VLCCs out of that trade would not enhance U.S. participation in the foreign trade and will not further any of the other objectives of the Act.

(iii) A number of commenters believed that the rule will hurt the existing foreign fleet, i.e., those non-paying CDS VLCCs, by eliminating their main source of employment in the domestic trade (through six-month waivers).

Full-time employment of the repayment VLCCs may have eliminated a source of employment, i.e., six-month waivers, for non-repaying CDS VLCCs. However, under Part 250 employment of the non-repaying CDS VLCCs in the ANS trades may have otherwise been blocked by an "unemployed" non-CDS tanker. Furthermore, under

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[13] If the vessels could have been operated profitably in the foreign trade following re-engining. It is reasonable to presume that their owners would have taken that step prior to the 1986 rule, rather than allow the ships to remain idle at least six months each-year.

the 1985 CDS repayment rule, all CDS-built tankers were afforded the opportunity to permanently enter the domestic trades in exchange for repayment of CDS plus interest. Those non-repaying tanker owners have no basis to now complain that they are adversely affected by their failure to take that opportunity.

Moreover, as of April 10, 1987, three CDS-built VLCCs originally owned by Seatrain (NEW YORK, MARYLAND, MASSACHUSETTS) were turned over by bankruptcy court order to MARAD following MARAD's honoring of loan guarantees under Title XI of the Act following Seatrain's defaults. Seatrain no longer has any interest in operating those VLCCs. The only other CDS-built VLCC that did not repay is the WILLIAMSBURG operated by American Petrofina, which is not complaining.

e. Impact on the Domestic Fleet

Some commenters argued that CDS repayment has caused overtonnaging in the domestic fleet. Other commenters supported MARAD's assessment that the rule would benefit the domestic fleet overall.

(i) *Forecast of Alaskan Tanker Capacity.* MARAD believes that CDS repayment rule has not caused overtonnaging in the domestic trade, but has stabilized the trade by allowing permanent entry of a limited number of suitable tankers into the ANS trade instead of the uncertainty of six-month waivers for an uncertain number of VLCCs. Prior to the three post-1985 paybacks, six VLCCs for several years operated in the ANS trade on six-month waivers, representing the equivalent of three full-time operating VLCCs. Moreover, the BAY RIDGE has been operating in that trade since 1980.

In fact, despite a sharp decline in the upcoast petroleum products trades from 1984 to 1986, laid up domestic tanker tonnage has declined, in part due to high levels of tanker scrappings in 1984-86 as a result of the

Port and Tanker Safety Act (PTSA). The PRINCE WILLIAM SOUND and the ASPEN are laid up as a result of casualties, not because of lack of employment opportunities. Four of the inactive tankers, the NEW YORK (an integrated tug/barge), JACKSONVILLE (integrated tug/barge), FREDERICKSBURG and CHARLESTON are under long term charter to Amerada Hess. The Navy has announced it will purchase the SPIRIT OF LIBERTY for the Reserve Fleet. The CHESAPEAKE has been approved for foreign-flag transfer.

Of the remaining four tankers, all are more than 20 years old. The aggregate capacity of these four tankers (156,000 DWT) would not be sufficient to cover the loss of one VLCC in the event of a casualty. (A more complete discussion of the "bumping" process that could impact the domestic fleet is set out in the RIA at p. 31 and in section 1.F. below.)

Further, as of May 1987, there were 50 U.S.-flag tankers (with domestic trading privileges) over 20 years old. The aggregate capacity of these ships was 1.8 million DWT. This capacity is likely to be subject to greater maintenance requirements, i.e., out of service time, in the future. Some will likely be scrapped. Thus, the capacity of the domestic tanker fleet is expected to fall sharply in the late 1980s.

A further relevant consideration is that the repayment VLCCs have significantly lower cost per ton-mile than smaller tankers in the Valdez-Panama trade. If the payment VLCCs were removed from the Valdez-Panama trade, the total marine cost of transporting ANS crude oil would rise by approximately $386-$542 million. With resulting higher rates, cargo might be diverted from tankers to pipelines, i.e., All American and Four Corners pipelines, thus reducing tanker employment in the Valdez-Panama trade as well as the Panama-Gulf/East Coast trades.

ii. *Forecast of Alaska Crude Oil Production and Distribution.* The demand for tankers in the ANS trade in 1987 is expected to be 6.1 to 6.2 million DWT of which 2.7 to 2.8 million DWT will be in the Valdez to Panama trade. Production is expected to decline after 1989, thus reducing tanker demand in all segments of the ANS trade (RIA, Appendix VI).

As long as there is sufficient demand in the Alaska-Panama trade, MARAD expects that the VLCCs will continue to be employed in that trade. MARAD does not expect that they will be employed in the West Coast segment of the ANS trade if demand in the Valdez-Panama trade is insufficient to support all four VLCCs, given port constraints and the higher costs of lightering or operating the ships light loaded. (Although MARAD is aware that the BAY RIDGE did make one trip to Los Angeles in May 1987 light loaded at 160,000 tons recently, that was an unusual circumstance.)

While ANS tanker loadings have increased from 629 thousand barrels per day in 1977 to 1,788 thousand barrels per day in 1986, loadings are expected to fall after 1989, due to a decline in ANS production (RIA Table II-1).

The opening of the All American Pipeline in 1988 will likely further dampen the demand for VLCCs in the Valdez-Panama trades. The pipeline will have a capacity to move 300,000 barrels per day of either California or ANS crude oil from Southern California to the Texas Gulf. To the extent that ANS crude oil is shipped through the pipeline or more ANS crude oil is shipped to California to replace California crude, less oil will be shipped from Valdez to Panama.

Another factor which may reduce the demand for U.S.-flag tankers in the ANS trades in the early 1990's is the potential construction of a 105,000 barrel per day (rated capacity) refinery at Valdez by Alaskan Refining,

Inc. Products from the refinery may be transported abroad on foreign-flag tankers, thus reducing Valdez loadings for U.S.-flag tankers. The only possible foreseeable offsetting trend is the development of new oil fields, such as the Arctic Wildlife Reserve. Such development is extremely speculative.

f. Effect on the Naval Auxiliary

Some commenters contended that this rule will cause a displacement of handy-sized tankers, which are useful for the naval auxiliary. Others argued that there was no evidence that *any* tanker will be displaced by the four VLCCs.

One of the objectives of the Act is to foster the development of a merchant marine fleet "capable of serving as a naval and military auxiliary in time of war or national emergency . . . ." 46 U.S.C. 1101(b).

MARAD has considered the effect on the naval auxiliary of allowing the four VLCCs to remain in the domestic trade (see Regulatory Impact Analysis). MARAD believes that up to six handy-sized militarily useful tankers may possibly be displaced as a result of this rule. Market conditions and statutory requirements have contributed to a reduction in the number of U.S.-flag product tankers, including a declining upcoast petroleum trade (the principal market for U.S.-flag product tankers), the opening of the Trans-Panama Pipeline in 1982, and the anti-pollution standards of the PTSA.

As a result of these factors, 41 tankers, of the type considered highly military useful, were scrapped over a three year period from 1984 through 1986 (see RIA. Appendix 1). All had exceeded their statutory life of 20 years (see RIA, Appendix 1). The average age of these tankers was 34 years. Further, the 1978 PTSA set certain anti-pollution requirements for tankers entering United States waters. By January 2, 1986, crude oil

tankers between 20,000 and 40,000 DWT were required to have segregated ballast tanks or a crude oil washing system, and product tankers between 20,000 and 40,000 DWT were required to have segregated ballest tanks or dedicated clean ballest tanks. To comply with the PTSA requirements, tanker owners had the option of retrofitting existing systems, reducing load lines (so as to carry less than 20,000 DWT), using port reception facilities under a specific trade exemption, scrapping, or changing the tanker's service. Due to the cost of retrofitting and resulting loss of cargo capacity, and the inherent limitations of reducing load lines or obtaining a specific trade exemption to use port reception facilities, many tanker owners scrapped their older, less efficient vessels. The PTSA served to speed up the natural process of scrapping that occurs when tankers exceed their useful life.

Of those 41 that were scrapped, 25 were scrapped in 1984, nine in 1985, and seven in 1986. The vast majority of those lacked some or all of the anti-pollution features required by the PTSA. Of the seven scrapped in 1986, four lacked PTSA features. The average age of those tankers was 35 years.

These figures indicate that the scrapping that has occurred in the past three years is not attributable to CDS repayment but rather to the age of the vessels, their inability to economically retrofit to satisfy PTSA requirements and poor market conditions. Since the effective date of the PTSA requirements (January 2, 1986), the number of product tankers scrapped has declined. MARAD believes that this decline in scrapping will continue, since the oldest, least efficient tankers have already been scrapped. In addition, since the enactment of the PTSA, a number of new product tankers have been built.

Further, any effect that the four VLCCs would have on the handy-sized tankers would be indirect, unlike the above factors. VLCCs generally do not compete with these smaller tankers in the same trades. As discussed

above, VLCCs have historically served the Alaskan-Panama trade, and smaller tankers serve the Panama Gulf/East Coast trades. While a mix of vessels served the West Coast, the four VLCCs have not entered that trade. The BAY RIDGE made one trip to Los Angeles in May 1987. Thus, any effect the VLCCs may have on the smaller tankers would be through an indirect displacement. That is, the VLCCs, being more cost-effective, may "bump" other large tankers that could serve the Alaska-Panama trade. In turn, these large tankers could operate in the West Coast and Panama/Gulf trade, picking up oil that could have been carried by smaller tankers. A trend in this direction is indicated by Table III-2 in the Regulatory Impact Analysis. However, such "bumping" effects are much more remote than the effects of the PTSA, the Trans-Panama Pipeline, and declining market conditions, over which MARAD has no control.

Moreover, the current goal of the Navy is to increase the number of tankers in the Ready Reserve Force from eight to twenty by the year 1992. This makes it more likely that if militarily useful tankers became commercially unattractive, the Navy will be able to purchase these vessels for military support. In a letter dated June 10, 1987, the Department of the Navy stated its support for the Department of Transportation's position in its rulemaking. That letter has been placed in the docket.

g. Impact on Employment of U.S. Seamen

Many seamen and others commented that from 600-900 jobs will be lost due to CDS repayment. Others argued that no jobs will be lost due to CDS repayment.

MARAD predicted in the draft RIA that 600 seamen's jobs could be lost due to CDS repayment. The lost jobs related to the 12 Jones Act tankers (employing approximately 600 seamen) then laid up. For reasons explained in the final RIA MARAD believes only possibly six tankers might be displaced. (However, this possible loss would

be offset by employment of the four VLCCs.) The possible displacement of six tankers would result in the potential loss of 300, with a net loss of approximately 100 jobs if the four VLCCs were laid up (and a net loss of 225 jobs considering possible section 506 waivers to the four VLCCs.) However, MARAD believes that this rule is only one of many factors contributing to the tanker lay ups. MARAD believes that the direct effects of the rule will further other important objectives of the Act, and counterbalance any possible indirect negative effects on employment.

2. Employment Prospects for the Four VLCCs in the Domestic Trade

Several commenters disagreed with MARAD's predictions for domestic employment prospects for the four VLCCs. ARCO argued that employment prospects apeared positive.

Employment prospects for the four VLCCs in the ANS trade appear to be positive at least for the near future. It is with this near future in mind that these vessels repaid their CDS. Domestic trading restrictions for CDS-built vessels are lifted at the end of their statutory life (i.e., 20 years).[14] The ARCO INDEPENDENCE and ARCO SPIRIT were built in 1977, the BROOKLYN in 1973, and the BAY RIDGE in 1979.[15] Since no new tankers are on order, and prospects for newbuildings seem unlikely, these four VLCCs are among the most suitable vessels for the Alaska-Panama trade. If the four VLCCs remain in the domestic trade, there will be an adequate supply of suitable tonnage to carry oil in that

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[14] *See* Senate Report No. 28 (79th Cong., 1st Sess. July 9, 1965).

[15] Even without the present rulemaking, these vessels would be allowed to enter the domestic trade at the end of their 20 year useful life. Thus, the effects of this rulemaking would expire in the mid to late 1990s.

trade even if other older tankers are scrapped and if no new tankers are built.

If the four VLCCs were removed from the domestic trade, a shortage of the most suitable tonnage in the Alaska-Panama trade would occur, necessitating the entrance of smaller, less suitable tankers in that trade, and would also likely result in those VLCCs being laid up, since they are unable to compete in the foreign trade.

In conclusion, as far as can reliably be foreseen, the continued employment in the Alaskan oil trade for the four VLCCs that repaid CDS would benefit the U.S. domestic waterborne commerce by providing vessels that are most suitable for the Alaska-Panama oil trade and by providing an employed, well-balanced merchant marine.

3. Environmental Impacts

a. Oil Spill Risk

(i) Several commenters stated their concern that the four VCCLs would "bump" safer, smaller vessels that serve the West Coast trade and introduce and allow the increased operation of VLCCs between Alaska and California, resulting in more vessel traffic, reduced fishing vessel safety and increased risk of a large oil spill.

Adoption of the rule is not expected to introduce CDS-built VLCCs to the West Coast trade. The only instance of one of the VLCCs calling at the West Coast is the BAY RIDGE, which called at Los Angeles light-loaded in May 1987. The VLCCs that repaid and that are operating pursuant to that repayment operated regularly, before issuance of the 1985 rule, in the Valdez to Panama trade under the six month waiver process. Tanker routes between Valdez and Panama have not changed since the preparation of the 1985 EA (Environmental Assessment) that accompanied the 1985 CDS rule.[16]

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[16] MARAD is aware that Exxon took delivery of two non-CDS 209,000 DWT tankers in November 1986 and April 1987 and they

The proposed rule and the draft RLA predicted that smaller vessels in the Valdez to Panama trade would be "bumped" to shorter haul trips for the West Coast. They would not be bumped from West Coast trade or replaced in that trade by CDS-built VLCCs. However, MARAD believes that the distribution of tonnage employed in the domestic trade will not change substantially if the four VLCCs are allowed to remain in the trade.

In addition, the CDS VLCCs are safe as they are equipped with a variety of safety and environmental features which meet or exceed Coast Guard and MARPOL 73/78 safety and oil pollution standards for vessels of this type (see EA).

The CDS-built VLCCs will operate far offshort primarily in the long-haul Valdez to Panama trade with smaller vessels plying the shorter haul Valdez to West Coast trade. The risk of oil spill is greater in port than at sea. The total number of trips and port calls would decrease due to the larger carrying capacity of the VLCCs, thus reducing the overall risk of any accidental oil spill.

(ii) Several commenters argued that despite contrary predictions in the NPRM and the EA that fewer VLCCs would make fewer voyages, there remains the danger of a VLCC collision that would create a larger oil spill than that made by smaller tankers.

If the four VLCCs are removed from the ANS trade, a larger number of smaller tankers will operate making more voyages with more risk of collision than the VCCLs which are fewer in number and make fewer voyages and port calls. While the largest potential spill in the ANS trade would be from the collision of a VCLL transporting crude oil from Valdez, the maximum credible oil spill

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are designed to call at Los Angeles fully loaded; however, their operations are unrelated to this rule.

would result from a rupturing of the vessel's wing tanks containing 10-13 percent of the cargo according to a Coast Guard Final Environmental Impact Statement (U.S. Coast Guard Final Environmental Impact Statement, Texas Offshore Port). Such a maximum credible oil spill would remain the same even if the four VLCCs were not permanently in the domestic trade since foreign-flag VLCCs will continue to operate in the ANS trade (Valdez to Virgin Islands), as would the STUYVESANT and any CDS VLCCs allowed under six-month permissions.

b. Coastal Zone Management Act and Endangered Species Act

Several commenters contended that the consultation requirements of the Coastal Zone Management and Endangered Species Acts have not been complied with by MARAD and that the rule would result in the endangerment of certain species of animals (e.g., sea otters and whales) and "habitat deregulation."

As for compliance with the Endangered Species Act (16 U.S.C. 1536(a)(2)), MARAD continues to believe that this regulatory action is not likely to affect any species listed under the Endangered Species Act and result in the destruction or modification of critical habitat. However, MARAD has requested informed consulation with both the National Marine Fisheries Service and the Fish and Wildlife Service on the impact of the rule.

The DOT sent a letter dated June 17, 1987 to the National Marine Fisheries Service (Department of Commerce) again requesting concurrence in its determination that the rule is not likely to affect a species or modify a species habitat under the Endangered Species Act. This letter follows a previous letter dated May 21, 1987 from the MARAD Administrator also requesting concurrence. The Fish and Wildlife Service (Department of Interior) concurred by letted dated June 16, 1987.

The Coastal Zone Management Act (16 U.S.C. 1462 *et seq.*) requires that "when conducting or supporting activities directly affecting the coastal zone," an agency should strive to the "maximize extent practicable" to act in consistency with state coastal management programs. Certain commenters argued that, under this Act, MARAD should consult with the California Coastal Commission. Again, MARAD does not believe, as it stated in the EA, that there will be a direct effect on the coastal zone of any state as the result of promulgation of this rule. The rule will not result in physical alteration of the coastal zone or initiate a chain of events that would lead to alteration of the coastal zone. Hence, MARAD does not believe that any consultation is necessary. The four VLCCs at issue have historically served the Alaska-Panama trade, not the coastal trades and are expected to continue that pattern. The rule is not likely to increase traffic by VLCCs over 200,000 DWT in the coastal zones. Moreover, the rule is likely to result in an overall reduced risk of oil spill.

c. Environmental Impact Statement

Some commenters argued that an Environmental Impact Statement (EIS) should have been prepared rather than an EA.

MARAD did not violate the National Environmental Protection Act (NEPA) by issuing a Finding of No Significant Impact (FONSI) on the basis of the EA, rather than preparing an EIS, DOT Order 5610.1C, 45 FR 2244 (1980) (as amended) and the Council on Environmental Quality (CEQ) regulations, 49 CFR 1581.4 provide that an EA may be prepared to determine if an EIS should be prepared or if a FONSI may be made. If the EA demonstrates that a "major" action will have a significant impact on the environment, then an EIS must be prepared, if not then the agency may issue a FONSI.

The EA for this rule contains a detailed analysis of the potential environmental effects of the rule which ad-

dresses all the environmental issues raised by the commenters, e.g., risk of oil spills, air quality, fuel consumption, et cetera. It concluded that the potential impact upon the environment will not be significant. Moreover, the full time participation by these vessels in the ANS-Panama trade is consistent with experience in trade prior to the 1985 rule, in light of the former level of six month permissions. Thus, there will be little if any change in environmental impacts as a result of this rule.

In sum, MARAD's determination to issue a FONSI is reasonable and within its agency's discretion. *Catinet Mountains Wilderness* v. *Peterson*, 685 F.2d 678, 681 (D.C. Cir. 1982), *Sierra Club* v. *Department of Transportation*, 753 F.2d 120, 126-27 (D.C. Cir. 1985).

d. Coast Guard EIS on Puget Sound

Some commenters noted that the EIS that the Coast Guard prepared for its Puget Sound rulemaking predicted increase spills with supertanker use. These commenters see this as contradictory to predictions in the EA. However, the issue for decision in the Puget Sound rulemaking (47 FR 17968; 1982) concerned the admission of 200,000 DWT tankers into an area where the previous maximum was 125,000 DWT. The Coast Guard was concerned that the volume of the maximum credible spill from a 200,000 DWT tanker would potentially be considerably greater than that from a tanker of 125,000 DWT and, therefore, increase the potential damage from a major oil spill. Thus, the rule maintained the 125,000 DWT limit. The four VLCCs, along with all vessels over 125,000 DWT, are precluded from entering the Puget Sound under the Coast Guard rule. This CDS repayment rule will not result in the introduction of tankers larger or in greater numbers than those already in use in any location, so there would be no increase in the size of the maximum credible spill.

e. Oil Spill Clean-Up

Some commenters stated that several factors (dense fogs, rough seas, inadequate and defective equipment) negatively affect the ability of so-called "state of the art" oil spill containment and clean-up equipment to function effectively if there were an oil spill.

As for the commenters' contention that the oil pollution clean-up equipment is inadequate or defective, MARAD reiterates that it does not believe the risk of an oil spill has been increased by this final rule (the computed overall frequency of predicted oil spill is reduced, and the size of the maximum credible spill is the same).

If a spill did occur, the present stock of oil pollution equipment is the only means of spill control and clean-up available. This rule cannot set requirements for efficiency or adequacy for pollution clean-up equipment. Nor would it be appropriate or possible to bar safe vessels from operating in the domestic trade until more effective equipment becomes available.

f. Lightering

Some commenters argued that environmental risks will be increased due to increased lightering.

As noted above, it is possible that small Jones Act VLCCs, between 160,000 and 200,000 DWT, may be bumped from the Alaska-Panama trade as a result of this rule. These vessels have drafts which exceed the port and terminal depth limits of some West Coast ports when fully loaded. Sometimes vessels are light-loaded at Valdez when necessary to meet West Coast draft restrictions. (It should be noted the BAY RIDGE called at Los Angeles light-loaded in May 1987.) Minimal lightering may have been necessary on the West Coast for vessels with drafte exceeding port depths, particularly at San Francisco.

The amount of the increase in lightering on the Gulf Coast does not appear to be significant, as the two 120,000 DWT tankers which are now employed in the Panama-Gulf Coast trade are able to offload at the deep water Louisiana Offshore Oil Port (LOOP).

g. Relative Safety of the VLCCs

A few comments argued that the four VLCCs are not safer than smaller tankers. ARCO argued that its vessels are safer.

Allowing the four VLCCs to remain in the domestic trade will further the goal of section 101 of the Act to encourage the development of a fleet composed of the "safest" vessels. As is shown in the EA prepared for this rule, these VLCCs are equipped with a number of safety and pollution control features. The change in oil spill risks for the ANS fleet is expected to continue to improve as more VLCCs and other large tankers replace, where permitted by navigation channel depths. If the four VLCCs were not allowed to remain in the domestic trade, a tonnage shortfall could cause a greater oil spill risk if additional small vessels such as barges were to be employed to compensate for the shortfall.

4. Transportation Savings

Some commenters disputed the figures in the NPRM regarding transportation savings. Others believed that large transportation savings would result from the rule. The State of Alaska commented it had done an analysis in 1985 which showed that CDS tankers save 45 percent on average shipping costs over non-CDS tankers.

MARAD estimates that the transportation savings resulting from CDS repayment will be approximately $386 to $542 million (present value). Appendix III of the RIA shows the transportation savings for the years 1985 through 1989 by trade. The numbers have been revised

from the NPRM to reflect transportation savings only for the short-term charters and do not include proprietary or long-term charter rate changes. Appendix V of the RIA shows the rates used to estimate the transportation savings by trade and vessel size. These rates reflect market rates and also include fuel costs. Appendices II and VI of the RIA show West Coast crude supply/disposition and estimated distributions of ANS crude oil. These numbers reflect the increase in ANS production, a decrease in West Coast production, and a one percent increase in West Coast crude oil demand from the actual 1986 figure, based on comments.

5. Title XI Defaults

Several commenters believed that the Title XI defaults resulting from the impact of CDS repayment would be greater than MARAD predicted in the NPRM and draft RIA. Others believed the defaults would be less than predicted.

The possibility of five Title XI defaults of $88 million has been revised to one of $16 million based upon the May 12, 1987 lay-up list. Nine of those 23 tankers had Title XI outstanding, but four of them have oil company charters, and three have paid down their Title XI loans to such a small amount that it is unlikely that they will default. MARAD estimates that of the two remaining there is a remote chance that one may default before 1989 and has thus revised Tables VI-3 and VI-4 in the RIA.

6. Promotion of Efficiency and Competition

A number of commenters claimed that MARAD's arguments in the preamble of the NPRM regarding efficiency and competition were in opposition to the Court of Appeal's decision vacating the 1985 CDS rule. Other commenters supported MARAD's arguments as being within the clear ambit of the Act and that decision.

The basis for this present rulemaking is section 101 of the Act. As explained above, MARAD believes that this rulemaking will further the purposes and policies of the Act by providing vessels suitable for the domestic trade, and will encourage a well-balanced domestic fleet. MARAD included a discussion of efficiency and competition in its NPRM in order to show that these reasons, while not *the basis* for the present rulemaking, do support it, and are justifiable reasons in light of other provisions of the Act.

While section 101 of the Act establishes the general objectives of the Act, other parts of the Act give more specific guidance on interpretation and implementation of these goals. The Act explicitly and implicitly establishes other policy goals in furtherance of the maintenance and development of the U.S. merchant marine fleet. Among these goals, mentioned in the prior CDS final rule (50 FR 19170), are efficiency and competition. Each of these goals has been recognized by the courts as valid policies for promoting the U.S. merchant marine fleet.

A. *Efficiency.* The goal of efficiency of the fleet is mentioned throughout the Act. Among the express goals of section 101 is that the merchant marine shall be composed of "suitable" vessels manned by "efficient" crews. Certainly, the idea of "suitable" vessels encompasses efficiency as a principal component.

The goal of efficiency is reflected in the legislation establishing the CDS program, which is designed to produce vessels of "high transport capability and productivity." Merchant Marine Act, 1936, as amended, sec. 501 (46 U.S.C. App. 1151. Other provisions in the Act are intended to promote fleet modernization. Under section 213, the Secretary is required to report to Congress annually on the scrapping of old vessels, and the relative cost of ship construction and reconditioning in U.S. shipyards. The Secretary's authority to acquire obsolete vessels for an allowance of credit under section 510(b) is

intended "to promote construction of new, safe, and efficient vessels to carry the domestic and foreign waterborne commerce of the United States. . . ."

In addition, the Department of Transportation authorization statute further declares it to be an overriding purpose that national transportation policies and programs be "conducive to the provision of fast, safe, efficient, and convenient transportation at the lowest cost consistent therewith. . . ." 40 U.S.C. 1101. Any ambiguity in the Merchant Marine Act regarding the goal of promotion of efficiency is resolved in favor of that goal through the purposes and policies established in the Department's statute. *Id.*

In addition to these explicit statutory provisions promoting efficiency of the U.S. merchant marine fleet, several recent court decisions have affirmed that one objective of the Act is to encourage modernization and efficiency. For example, the Supreme Court's decision confirming the Secretary's statutory authority to grant permanent release to vessels under CDS restrictions found that a basic goal of the Act was to encourage the maintenance of an "effective merchant marine" with a "fleet [that] was to be modern and efficient." *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572, 584 (1980). Further, the D.C. Circuit recently described the first goal of the Act as promoting "a well-equipped and efficient merchant fleet." *American Trading Transportation Co.* v. *United States*, 791 F.2d 942, 944 (D.C. Cir. 1986); *see also Sea-Land* v. *Dole*, 723 F.2d 975, 976 (D.C. Cir. 1983).

The above statutory provisions and judicial interpretations strongly support the goal of promoting efficiency and modernization of the U.S. merchant marine fleet. These goals will be furthered by this rulemaking, which will allow the four VLCCs, which are among the most efficient U.S. tankers in the fleet, to remain active.

B. *Competition.* While the Act does not explicitly list competition as one of its goals, the promotion of competition in the foreign and domestic trades is implicit in the Act. The Act's ODS and CDS programs are intended to give the U.S. merchant marine fleet certain financial resources to cempete with lower-cost foreign fleets while not guaranteeing any profit. In particular, Congress made this objective clear in enacting the Merchant Marine Act of 1970, which extended those programs to the unregulated bulk trades. *See* Merchant Marine Act, 1936, 663(b), 40 U.S.C. 1773(b); H. Rep. No. 1073, 91st Cong., 1st Sess., 36 (1969).

Nor is the Jones Act trade immunized from competition within that trade. That is, the Act restricts competition in the Jones Act trade only to the extent necessary to protect unsubsidized U.S. operators from unfair competition from vessels that receive financial assistance (such as ODS and CDS). In the domestic trade, the Secretary has a duty "to minimize interference with the free market forces normally at work. . . ." *ITOC* v. *Lewis, supra,* 690 F.2d at 917.

In its seminal case on the relation between the foreign and domestic trades, the D.C. Circuit stated that "competition is not 'unfair' within the meaning of the Act when it does not involve diversion of money to unsubsidized domestic operations from subsidized foreign operations, to the disadvantage of an unsubsidized operator. Congress plainly did not intend to prevent that sort of competition." *Pacific Far East Line, Inc.* v. *Federal Maritime Board,* 275 F.2d 184, 186 (D.C. Cir. 1960). Other courts have likewise recognized the overriding public policy in favor of competition in the domestic trade and in national transportation policy. *See e.g., Matson Navigation Co.* v. *Connor,* 259 F. Supp. 144, 158 (N.D. Cal. 1966), *aff'd per curiam,* 394 F.2d 514 (9th Cir. 1968); *Bowman Transportation Inc.* v. *Arkansas-Best Freight System, Inc.,* 419 U.S. 281, 198-99 (1974).

Finally, the Supreme Court made clear its preference for fair competition (as opposed to regulated entry under six month permission) in its decision confirming the Secretary's authority to accept permanent repayment in *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, U.S. 572, 589-99 (1986):

> Section 506 . . . permit[s] a vessel that enjoys the benefits of CDS to operate outside the foreign market only in narrow circumstances, generally upon a highly discretionary administrative decision, and no more than six months a year. And we have no doubt that it would be flatly inconsistent with one congressional intent were the Secretary or this court to conclude that a temporary release not meeting these conditions was proper. But a permanent release upon full repayment is quite different. It irrevocably locates the vessel in the unsubsidized fleet and, thus, poses no danger of a supercompetitor skimming the cream from each market. It creates no longer-term instability. And it confers no windfall. On the contrary, at least where repayment of the CDS includes some amount reflecting capital costs which would have been incurred had no subsidy been available, such a transaction merely permits a once subsidized vessel to enter the domestic trade on a footing equal to that of vessels already in that trade. It was not the purpose of the Act to prohibit such entry. . . .

Thus, to the extent that the capacity allowed to enter the domestic trade under CDS repayment would have been allowed to participate in the trade under six month permissions, allowing total CDS repayment would necessarily be consistent with the "purpose of the Act." *Id.*

7. Alternatives to the Final Rule

Some commenters thought MARAD should reconsider its alternatives discussed in the proposed rule. Several

proposed a number of alternatives not considered in the NPRM, such as exclusion of the BAY RIDGE from the rulemaking, and then allowing only one or two of the VLCCs to remain in the domestic trade. Others found MARAD's rejection of alternatives convincing, and supported its analysis of the alternatives.

MARAD considered three alternatives in the NPRM. The first is to maintain the *status quo, i.e.*, to allow the four VLCCs to remain in the domestic trade. The costs and benefits of this alternative have been discussed at length in this statement, and in the Regulatory Impact Analysis (see RIA, p. 30). Further costs, evaluated in the Regulatory Impact Analysis, include the recent Title XI defaults of three VLCCs that previously participated in the domestic trade under six-month waivers, and partial defaults of two other CDS-built VLCCs (STUYVESANT and BAY RIDGE). These costs were not necessarily attributable to CDS repayment and in any event are irreversibly expended at this time (i.e., removing the four VLCCs from the domestic trade would not recover this money). The total default cost to the government has been $137.5 million.

Another relevant consideration is the effect on the existing Jones Act fleet. As of May 12, 1987, 23 Jones Act tankers were inactive (totaling approximately 1,152,600 DWT). On the other side of the ledger, if CDS repayment is not allowed for the four VLCCs, they are likely to be laid up (approximately 705,000 DWT).

MARAD believes that the suitability of the four VLCCs for the Alaska-Panama trade outweighs any possible disadvantages of the rule. The average age of the 23 idle tankers is 20 years old. These smaller tankers could serve in the ANS trade, although at a much higher cost per ton than VLCCs currently operating in that trade (see RIA). For example, the cost of operating a 50,000 DWT tanker in the Valdez-Panama trade is ap-

proximately, $25.00 per ton of cargo, compared to $9.19 per ton for a 265,000 DWT VLCC operating in the same trade. Further, as noted above, larger tankers are more suitable than smaller tankers from an environmental standpoint because they make fewer voyages and port calls than smaller tankers to carry the same amount of oil, thus reducing the risk of collisions and oil spills (see Environmental Assessment).

A second alternative considered is for MARAD to do nothing, i.e., to allow the rule to be vacated, as of July 16, 1987, and for the three VLCCs to leave the domestic trade. Under this scenario MARAD assumes that the BAY RIDGE would also leave the domestic trade at the same time. The costs of doing nothing would be a shortage of suitable tonnage for the Valdez-Panama trade and the likely lay-up of the four VLCCs that repaid CDS under the 1985 rule. There would not be enough ships to meet seasonal peak demands in the domestic petroleum trade. Section 506 waivers would be necessary. Other costs of this alternative would be the loss to the government of CDS repayments of $142 million from those four VLCCs, the reduction of Alaska state revenues due to higher transportation costs in later years, and the loss of transportation savings to the shipping public.

The benefits of this alternative could be reduced government loan exposure risk on existing Jones Act tankers and the possibility of some of the laid up domestic tankers operating in the ANS trade. However, due to the age and small size of most of those tankers, they would be unsuitable for the Valdez-Panama trade. Further, only 4.5 percent of the domestic tanker fleet less than 20 years of age was inactive. There is a need for a reasonable reserve for covering temporary losses from the active fleet due to casualties (three in 1986), surveys and repairs, as well as seasonal increases on the upcoast petroleum movements.

Under this second alternative, shipbuilding demand for new crude tankers would still be minimal, if any, due to the high cost of U.S. shipbuilding, the unlikely availability of future CDS funds due to budget constraints, and the predicted future decline in the volume of crude carried in the Alaska-Panama trade.

The third alternative considered would allow an opportunity for other U.S.-flag tanker owners to repay CDS in return for unrestricted domestic trading privileges. Under this approach, those vessel owners with the best prospects for employment would likely choose to repay. Unrestricted repayment would reduce the need for federal issuance of temporary permissions to enter the ANS trade. Fiscal benefits could also be the greatest under this alternative. However, it is unlikely that any more vessels would repay under this alternative, since only three repaid when the window was open for one year and two EXXON 209,000 DWT Jones Act tankers have recently been delivered. This alternative would cause the most disruption to the Jones Act trade as there would be uncertainty in the market. Shipyard demand for new crude tankers would remain at a minimal or non-exsitent level.

In response to the comments, MARAD has considered a fourth alternative to the rule, i.e., allowing only two of the four VLCCs to remain in the domestic trade. This option assumes that one 265,000 DWT and one 225,000 DWT vessel remain in the trade with a total CDS repayment of $63 million. The costs and benefits of this alternative are analyzed in the RIA.

However, MARAD believes it would be difficult to choose which of the four VLCCs should remain in the trade. Such a decision likewise would be difficult if MARAD were to choose only one, or three, of the four VLCCs to remain in the trade. Such a decision would have an element of arbitrariness to it, since it either would favor one or more of the VLCCs that repaid on an

equal footing with all other CDS-built VLCCs through the 1985 CDS rule, or, in the case of the BAY RIDGE, repaid under fairly similar criteria in reliance on continued operations in the domestic trade.

MARAD estimates that the transportation savings on this option would range from $137-$166 million. If only two VLCCs are allowed to remain in the domestic trade, there would be a shortfall of approximately 338,400 DWT on a full-time equivalent basis, unless tonnage were brought out of lay-up or section 506 waivers were granted. Fiscal benefits would be fewer than under the rulemaking option since there would only be $63 million in CDS repayment from two VLCCs and Alaska state revenues would be reduced by higher transportation costs. Demand for newbuilding of crude tankers would continue to be minimal.

MARAD continues to believe that the best option in light of the purposes and policies of the Act is to allow the four VLCCs, all of which are particularly suitable for the Alaska-Panama trade, to remain in the domestic trade. Further, allowing them to remain in the trade will promote the domestic commerce in furtherance of the goals of the Act by eliminating the current uncertainty regarding the operation and use of the VLCCs in the Alaskan oil trade, facilitating planning for oil companies and tanker owners.

E.O. 12291, Statutory and DOT Requirements

The Maritime Administrator has determined that this rule is major under the criteria of Executive Order 12291. Pursuant to the Department of Transportation's Regulatory Policies and Procedures, DOT Order 2100.5 (49 FR 11034, February 26, 1979), this rule is also considered to be "significant" because it concerns a matter on which there is substantial public interest.

The Maritime Administrator certifies that the rule will have no significant economic impact on a substantial

number of small entities pursuant to the Regulatory Fexibility Act of 1980 (5 U.S.C. 601 *et seq.*) The companies owning and chartering the four VLCCs at issue, and companies owning or chartering tankers possibly affected by the rulemaking in the foreign and domestic trades, are either large oil companies or large independent shipping companies.

A Regulatory Impact Analysis has been prepared and is available for public review and copying in the Docket (R-110) in the Office of the Secretary. Maritime Administration (room 7300). It discusses the important economic aspects of this proposed rule, and is incorporated by reference into this rule.

An Environmental Assessment of the rule has also been prepared, and may be inspected at the Office of the Secretary, Maritime Administration, room 7300. The Environmental Assessment concludes that the effect of the rule will be that greater quantities of ANS oil would be transported in VLCCs than in smaller vessels, fewer total trips would be made by a smaller number of vessels, the risk of accidental oil spill would be reduced as the number of trips decreases. In addition, the tankers which have repaid CDS are equipped with safety and environmental features required by statute. Overall, the risk to the environment will be reduced with the rule as compared to without it. On the basis of this environmental assessment, the Maritime Administration has concluded that the rule will not result in a significant environmental impact.

The rule contains no paperwork requirements under the Paperwork Reduction Act.

This final rule is effective upon publication. MARAD for good cause finds that the 30 day period between publication and the effective date must be waived. 5 U.S.C. 553(d)(3). The rule must be made effective prior to the judicially imposed deadline of July 16, 1987 in order to

avoid disruptions in the domestic trade. MARAD believes that it has acted in good faith in conducting an informal rulemaking with notice and opportunity for comment and issuance of this final rule responding to comments within a relatively short period. The courts have found that a judicially imposed deadline may constitute good cause for making a rule effective immediately. *American Federation of Government Employees* v. *Block*, 655 F.2d 1153 (D.C. Cir. 1981). The D.C. Circuit has stated that ". . . the requirement of 553(d) that publication of a rule be made at least thirty days prior to its effective date serve[s] the laudable purpose of informing affected parties and affording them a reasonable time to adjust to the new regulation." *Id.* at 1157.

Since this final rule effectively continues the participation of VLCCs that have operated in the Alaskan oil trade for at least a year, the public does not need time to prepare for this final rule. *See* Ellen R. Jordan. "The Administrative Procedure Act's 'Good Cause' Exemption." 36 *Administrative Law Review*, 113, 119, 141 (Spring 1984).

List of Subjects in 46 CFR Part 276

Maritime Carriers.

PART 276—[AMENDED]

46 CFR Part 276 is amended as follows:

1. The authority citation for Part 276 continues to read as follows:

Authority: Secs. 204(b), 207, 506, and 714, Merchant Marine Act, 1936, as amended (46 U.S.C. 1114(b), 1117, 1156 and 1204) Pub. L. 86-518 (74 Stat. 216); Reorganization Plans No. 21 of 1980 (64 Stat. 1273) and No. 7 of 1981 (75 Stat. 840), as amended by Pub. L 91-469 (84 Stat. 1036); and Dept. of Commerce Organi-

zation Order 10-8 (36 FR 19707); July 23, 1973), unless otherwise noted.

2. Section 276.3 is revised to read as follows:

§ 276.3 Total repayment.

(a) The Maritime Administration reaffirms the allowance of the irreversible total repayment of unamortized construction-differential subsidy (CDS), with interest and rescission permanently of the domestic trading restrictions related to the grant of CDS for tankers of any deadweight tonnage for applications approved between June 6, 1985 and June 5, 1986, in accordance with the terms and conditions of paragraph (b) of this section. The approved applications were for the ARCO INDEPENDENCE, ARCO SPIRIT and BROOKLYN.

(b) *Repayment terms.* The full repayment amount consists of the unamortized CDS, as determined by the Maritime Administration, with compounded interest on that amount. The interest rate is the same as the long-term interest rate the owner obtained, or would have obtained if long-term debt financing had been used, in financing the owner's portion of the tanker. Unless the Maritime Administrator determined that using interest rates other than long-term bond rates was justified, such rates are used. If more than one long-term bond was issued to finance the owner's portion of a specific tanker, or if one or more of such bonds has more than one rate (such as a serial bond) an average interest rate is computed weighted by the proportion of each bond par value to the total par value of all long-term bonds issued to finance the owner's tanker. The interest payable on the unamortized CDS is computed by continuous compounding of the interest until the day of repayment. For purposes of this paragraph, "long-term bond rates" are either actual Title XI bond rates on a specific owner's tanker or the Title XI long-term bond rate at the time the tanker's statutory life began.

(c) The Maritime Administration reaffirms the allowance of the irreversible total payment of unamortized construction-differential subsidy with interest and rescission permanently of the domestic trading restrictions relating to the grant of CDS for the BAY RIDGE, which repaid on November 1980.

By Order of the Maritime Administrator, James E. Saari,

Secretary, Maritime Administration.

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No. 89-1223

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

INDEPENDENT U.S. TANKER OWNERS COMMITTEE, *et al.*,
Petitioners,
v.
SAMUEL K. SKINNER, SECRETARY OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS ATLANTIC RICHFIELD COMPANY, BP OIL SHIPPING COMPANY, USA, AND AMERICAN PETROFINA, INCORPORATED

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QUESTIONS PRESENTED

1. Did the court of appeals correctly construe appropriations legislation when it held that, under the plain meaning rule, the statute applied prospectively only and did not invalidate a rule promulgated by the Maritime Administration ("MarAd") weeks before the enactment of the legislation in question?

2. Did the court of appeals correctly hold that the rule in question was not "arbitrary or capricious," where MarAd had fully explained the rule's basis and purpose, the ways in which it promoted the objectives of the Merchant Marine Act, 1936, 46 U.S.C. app. § 1101, *et seq.*, and the reasons why it adopted the rule in preference to proffered alternatives?

PARTIES TO THE PROCEEDING

The parties are correctly identified in the petition for a writ of *certiorari* (page ii), except that the corporate name of SPC Shipping Inc., an appellant in the court of appeals and a respondent here, has been changed to BP Oil Shipping Company, USA.

Pursuant to Rule 29.1, and consistent with their understanding of the purposes of the Rule, respondents set forth those parents and subsidiaries of respondents with outstanding securities that are in the hands of the public:

Atlantic Richfield Company

Agro Internacional, S. de R.L. de C.V.
Alyeska Pipeline Service Company
Arco Chemical Company
Badger Pipe Line Company
Black Lake Pipe Line Company
Blair Athol Coal Pty., Limited
Colonial Pipeline Company
Cook Inlet Pipe Line Company
Dixie Pipeline Company
East Texas Salt Water Disposal Company
85819 Canada Limited
Iricon Agency Ltd.
Kenai Pipe Line Company
Kuparuk Transportation Company
Kuparuk Transportation Capital Corporation
Logan Aluminum Inc.
Lyondell Petrochemical Company
Nihon Oxirane Company, Ltd.
Platte Pipe Line Company
Showa Arco Solar Far East PTE LDD
Showa Arco Solar KK
Tecumseh Pipe Line Company
Texas-New Mexico Pipe Line Company

BP Oil Shipping Company, USA

Anadromous, Inc.
BP America Inc.
BP Australia Holdings Limited
BP Canada Inc.
BP Capital BV
BP Developments Australia Limited
BP Exploration (Alaska) Inc.
BP Finance Australia Limited
BP France
BP North American Finance Corporation Inc.
BP Oil Company
BP Oil Distribution Limited
BP Overzee BV
BP Pipelines (Alaska) Inc.
The British Petroleum Company p.l.c.
Britoil p.l.c.
Hope Brook Gold Inc.
Lear Petroleum Corporation
Old Ben Coal Company
Service Station Holdings Inc.
The Standard Oil Company
Truckstops Corporation of America
Western Ground Rents Limited

American Petrofina, Incorporated

American Petrofina, Incorporated is majority owned, through a series of affiliated holding companies, by Petrofina S.A., a Belgian company whose stock is not publicly traded in the United States.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	vi
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	6
I. FUNDAMENTAL PRINCIPLES OF STATUTORY CONSTRUCTION SUPPORT THE HOLDING OF THE COURT OF APPEALS THAT SECTION 505 APPLIES PROSPECTIVELY ONLY, AND THAT DECISION DOES NOT WARRANT REVIEW BY THIS COURT	6
A. The Plain Language of Section 505 Demonstrates That the Statute Does Not Invalidate the 1987 Rule	7
B. Even Assuming That Resort to Legislative History Were Appropriate, the Legislative History Makes Clear That the Statute Was Intended To Apply Prospectively Only	10
C. The Decision Below Does Not in Any Way Undercut Congressional Ability To Enact Substantive Legislation Through Appropriations Bills	13
II. THE COURT OF APPEALS' DECISION NOT TO SECOND-GUESS THE AGENCY'S DETERMINATION ON A MATTER CLEARLY COMMITTED TO AGENCY DISCRETION WAS CORRECT AND PRESENTS NO ISSUE WARRANTING THIS COURT'S REVIEW	15
CONCLUSION	19

TABLE OF AUTHORITIES

Cases: Page

Alaska Bulk Carriers, Inc. v. Kreps, 595 F.2d 814 (D.C. Cir. 1979), *rev'd, Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572 (1980) 17
Allied Structural Steel v. Spannaus, 438 U.S. 234 (1978) 8
Bowen v. Georgetown University Hospital, 109 S. Ct. 468 (1988) 8
Bowsher v. Synar, 478 U.S. 714 (1986) 13
Caminetti v. United States, 242 U.S. 470 (1917) 7
Chevron U.S.A. v. National Resources Defense Council, Inc., 467 U.S. 837 (1984) 15
Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400 (1983) 8
Garcia v. United States, 469 U.S. 70 (1984) 10
Greene v. United States, 376 U.S. 149 (1964) 8
Independent U.S. Tanker Owners Committee v. Lewis, 690 F.2d 908 (D.C. Cir. 1982) 3
Independent U.S. Tanker Owners Committee v. Dole, 809 F.2d 847 (D.C. Cir.), *cert. denied*, 484 U.S. 819 (1987) 3, 4
INS v. Cardoza-Fonesca, 480 U.S. 421 (1987) 10
Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983) 15
National Treasury Employees Union v. Devine, 733 F.2d 114 (D.C. Cir. 1984) 13
Puerto Rico Maritime Shipping Authority v. Dole, 619 F. Supp. 312 (D.D.C. 1985), *vacated as moot*, 825 F.2d 502 (D.C. Cir. 1987) 18
Schweggman Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1981) 10
Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572 (1980) 2, 3, 16, 17, 18
TVA v. Hill, 437 U.S. 153 (1978) 8
Union Pacific Railroad v. Laramie Stock Yards Co., 231 U.S. 190 (1913) 8
United States v. Locke, 471 U.S. 84 (1985) 10

TABLE OF AUTHORITIES—Continued

	Page
United States v. Security Industrial Bank, 459 U.S. 70 (1982)	8
United States v. Sperry Corp., 110 S. Ct. 387 (1989)	8
United States Marine International, Inc. v. Peterson, 518 F.2d 1070 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 912 (1976)	18
Statutes and Regulations:	
Administrative Procedure Act, 5 U.S.C. § 553(d)(3)	5
Merchant Marine Act, 1936, 46 U.S.C. app. § 1101, *et seq.*	i, 1
42 U.S.C. app. § 1101	2
46 U.S.C. app. § 1118	9
46 U.S.C. app. §§ 1151-1161	2
46 U.S.C. app. § 1156	2
46 U.S.C. app. § 1171(a)	15, 17
46 U.S.C. app. § 1171(a)(4)	18
46 U.S.C. app. § 1173(a)	18
46 U.S.C. app. § 1223	18
Pub. L. No. 100-71, 101 Stat. 391, 471 (1987)	5, 7
46 C.F.R. § 276.3	9
45 Fed. Reg. 68,393 (1980)	3
48 Fed. Reg. 4408 (1983)	9
Legislative Materials:	
H.R. CONF. REP. No. 195, 100th Cong., 1st Sess. 112 (1987)	12
H.R. REP. No. 28, 100th Cong., 1st Sess. 120-21, 145 (1987)	11, 12
S. REP. No. 48, 100th Cong., 1st Sess. 164 (1987)	11
133 Cong. Rec. E3170 (daily ed. July 30, 1987) (remarks of Rep. Regula)	12, 14
133 Cong. Rec. H2792 (daily ed. July 8, 1987) (remarks of Rep. Carr)	10
133 Cong. Rec. S9142 (daily ed. July 1, 1987) (remarks of Sen. Hollings)	10

TABLE OF AUTHORITIES—Continued

	Page
133 Cong. Rec. S10,866 (daily ed. July 29, 1987) (remarks of Sen. Mikulski)	11
"Statement of Administration Policy" (Apr. 15, 1987)	11
Statement of the President Upon Signing H.R. 1827, 23 WEEKLY COMP. PRES. DOC. 800 (July 20, 1987)	13
House Rule XXI, ¶¶ 2, 5	14
Senate Rule XVI, ¶¶ 2, 4	14
Miscellaneous:	
Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L.J. 456	11, 14
GAO, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW (1st ed. 1982)	8
Parnell, *Congressional Interference in Agency Enforcement: The IRS Experience*, 89 YALE L.J. 1360 (1980)	8
SUTHERLAND STATUTORY CONSTRUCTION (Sands 4th ed. 1984 & 1985)	7

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BRIEF IN OPPOSITION FOR RESPONDENTS ATLANTIC RICHFIELD COMPANY, BP OIL SHIPPING COMPANY, USA, AND AMERICAN PETROFINA, INCORPORATED

Respondents Atlantic Richfield Company, BP Oil Shipping Company, USA, and American Petrofina, Incorporated respectfully request that this Court deny the petition for a writ of *certiorari* filed by petitioners Independent U.S. Tanker Owners Committee, *et al.*, seeking review of the decision of the United States Court of Appeals for the District of Columbia Circuit in this case.

STATEMENT OF THE CASE

This case concerns the lawfulness of a rule promulgated by the Maritime Administration ("MarAd") pursuant to its authority under the Merchant Marine Act, 1936 (the

"Act"), 46 U.S.C. app. § 1101, *et seq.* To promote the development of a strong, competitive merchant marine, *see* 46 U.S.C. app. § 1101, Title V of the Act, 46 U.S.C. app. §§ 1151-1161, authorizes the Secretary of Transportation to pay a construction-differential subsidy ("CDS") of up to half of the cost of constructing a ship in the United States for operation in the foreign trade. By lowering the effective cost of American ship construction, CDS is intended to permit American-built vessels to compete successfully in the foreign trade with vessels built abroad.

Because CDS-built vessels have a capital-cost advantage over vessels built at unsubsidized domestic cost, Section 506 of the Act, 46 U.S.C. app. § 1156, requires the owner of a CDS-built vessel, as a condition of receiving the subsidy, to agree not to operate the vessel domestically. Under Section 506, the Secretary may waive this contractual restriction for periods not exceeding six months per year in exchange for repayment of a *pro rata* portion of the CDS paid for the vessel's construction. From 1977 through 1984, MarAd granted 43 such temporary waivers. These requests for waiver were prompted, as MarAd found, Pet. App. 52a-53a, by the collapse of opportunities for CDS vessels in the world tanker market, and by the simultaneous increased demand for such vessels to transport Alaska North Slope crude oil in the domestic trade. Virtually all of these waivers went to Very Large Crude Carriers ("VLCCs"), which MarAd considers the most suitable ships to transport crude oil from Alaska to Panama, for transshipment through the Canal to East and Gulf Coast ports.

In *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572 (1980), this Court unanimously held that MarAd has authority under the Act to cancel a subsidized vessel's domestic trading restrictions, and permit it to enter the domestic trade on a *permanent* basis, on repayment of

the entire unamortized portion of its CDS with interest.[1] Since 1980, MarAd has three times proposed a CDS payback rule pursuant to the authority reaffirmed in *Seatrain*. Each time, the proposed rule has been subject to rigorous judicial scrutiny in the Court of Appeals for the District of Columbia Circuit to assure conformity with the Merchant Marine Act, 1936, and the Administrative Procedure Act ("APA").

First, in 1980, MarAd adopted a rule establishing criteria for granting requests for a permanent revocation of domestic trading restrictions. 45 Fed. Reg. 68,393 (1980). Pursuant to this rule, MarAd approved CDS repayment by a VLCC, the BAY RIDGE. In *Independent U.S. Tanker Owners Committee v. Lewis*, 690 F.2d 908, 917 (D.C. Cir. 1982), while reaffirming MarAd's authority to adopt such a rule, the court of appeals vacated the rule, largely on the procedural ground that the rule lacked a general statement of its basis and purpose.

Then, in 1985, the Secretary adopted a different CDS payback rule, establishing a one-year period within which any CDS-built tanker could repay unamortized CDS, with interest, in exchange for revocation of its domestic trading restrictions. Pursuant to the 1985 rule, the owners of the ARCO INDEPENDENCE, the ARCO SPIRIT, and the BROOKLYN repaid CDS, and the vessels have since been entitled to operate in the Alaska trade. However, in *Independent U.S. Tanker Owners Committee v. Dole*, 809 F.2d 847 (D.C. Cir.), *cert. denied*, 484 U.S. 819 (1987) (*"ITOC II"*), the court of appeals again set the

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[1] The Court reasoned that such permanent entry is preferable to the temporary waivers expressly available under Section 506 since permanent entry does not pose the danger of a "supercompetitor" moving back and forth between the domestic and foreign trades and "skimming the cream" from both markets. *Id.* at 589. Rather, it simply allows "a once subsidized vessel to enter the domestic trade on a footing equal to that of vessels already in that trade." *Id.* at 590.

rule aside, on the ground that the Secretary's statement of basis and purpose was inadequate. The court of appeals required that the Secretary provide a fuller explanation of how the rule advanced the purposes of the Act and why alternatives were inadequate.[2]

Thereafter, on April 10, 1987, MarAd addressed the shortcomings identified in *ITOC II* and proposed a third rule (the "1987 rule," at issue here) reaffirming that the four VLCCs that had fully repaid CDS since *Seatrain*—the ARCO SPIRIT, the ARCO INDEPENDENCE, the BROOKLYN, and the BAY RIDGE—were released from restrictions on domestic operations. Pet. App. 59a. On June 19, 1987, after considering comments on the proposed rule, MarAd promulgated the final rule. Pet. App. 49a. In order to avoid the enormous disruption to domestic commerce that would have occurred had the court of appeals' mandate issued before the 1987 rule became effective, *see* note 2 *supra*, MarAd made the rule effective immediately on publication on June 22, 1987. Pet. App. 104a-105a.

While MarAd was conducting these rulemaking proceedings, however, petitioners were lobbying Congress to add a rider to an appropriations bill to derail the adoption of the rule. Legislation that would have barred promulgation of the rule was adopted in the House of Representatives, but defeated in the Senate, and legislation was not enacted before promulgation of the 1987 rule. On July 11, 1987, fully 19 days *after* the 1987 rule took effect, compromise appropriations legislation containing, as Section 505, the forward-looking language of the House bill was signed into law: "[n]one of the funds

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[2] The *ITOC II* court withheld its mandate for six months, until July 16, 1987, "to allow the Secretary to undertake further proceedings to address the problems of the merchant marine trade," and "to avoid further disruptions in the domestic market." 809 F.2d at 855.

appropriated . . . *shall be* used . . . to propose, promulgate, or implement any rule or regulation" relating to CDS repayment.[3]

On review commenced by the present petitioners, the district court set the rule aside on grounds (1) that Section 505 operated to invalidate the rule, and (2) that the rule was inconsistent with the objectives of the Act, not supported by record evidence, and thus arbitrary and capricious.[4]

On appeal, the court of appeals reversed. The court of appeals held that: (1) By its plain terms, Section 505 operated prospectively only and could not be read to invalidate a rule promulgated weeks before its passage; accordingly, no review of at-best ambiguous legislative history was necessary. Pet. App. 17a-20a. Moreover, and contrary to the district court's view, MarAd was not required to stay its hand merely because congressional committees were considering an appropriations bar, especially since one House of Congress had expressly disapproved such a provision at the time MarAd promulgated the 1987 rule. *Id.* at 16a-17a. (2) The 1987 rule was fully consistent with the purposes of the Act and was supported by the record, and MarAd had appropriately considered available alternatives before adopting the 1987 rule, as required by the court of appeals in *ITOC II*.[5]

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[3] Pub. L. No. 100-71, 101 Stat. 391, 471 (1987) (emphasis added).

[4] The district court also ruled that MarAd had not complied with the 30-day notice requirement under the APA, 5 U.S.C. § 553 (d)(3). Pet. App. 42a-45a. That ground, also reversed by the court of appeals, is not pressed in the petition for writ of *certiorari*.

[5] Pet. App. 10a-16a. The Court should be aware that on February 7, 1990, only one week after filing the petition for *certiorari*, one of the petitioners, Overseas Shipholding Group, Inc., filed in the court of appeals a motion to recall and modify the mandate. Respondents oppose the motion, which is *sub judice*, as without merit.

REASONS FOR DENYING THE WRIT

Petitioners have not identified any of the reasons specified in Rule 10 of the Court's Rules that would support review on *certiorari*. In fact, the petition presents ordinary and unexceptional questions of statutory construction and review of agency action that are undeserving of further review. The court of appeals applied well-settled precedent to those questions and reached a result that is indisputably correct.

I. FUNDAMENTAL PRINCIPLES OF STATUTORY CONSTRUCTION SUPPORT THE HOLDING OF THE COURT OF APPEALS THAT SECTION 505 APPLIES PROSPECTIVELY ONLY, AND THAT DECISION DOES NOT WARRANT REVIEW BY THIS COURT.

Contrary to petitioners' contention, this case poses no question as to "whether courts and executive agencies must give effect to Congress' substantive policy choices expressed in appropriations legislation." Pet. 13. Respondents have never disputed that appropriations legislation, like all other statutes, must be given effect, and the court of appeals did so here. But petitioners beg the questions *what* effect appropriations legislation like Section 505 must be given, and *what* "Congress' substantive policy choices" may have been.

As respondents show below, by faithfully applying long-settled, basic principles of statutory construction and this Court's unambiguous precedents, the court of appeals correctly held that Section 505, which Congress passed and the President signed after MarAd had promulgated its rule, must be given prospective effect only and did not operate retroactively to invalidate the 1987 rule. Review of that decision is clearly unwarranted.

A. The Plain Language of Section 505 Demonstrates That the Statute Does Not Invalidate the 1987 Rule.

At bottom, petitioners' argument rests on the unfounded notion that courts need not heed the plain, unambiguous language of statutes. Indeed, petitioners belittle the court of appeals for its adherence to "the literal form of the act." Pet. 11. Beyond dispute, however, the first rule of statutory construction is that "'[w]here the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion.'"[6]

As the court of appeals correctly concluded, the language of Section 505 is plain on its face and is not "susceptible to an alternative construction." Pet. App. 19a. Section 505 provides that "[n]one of the funds appropriated . . . *shall be* used . . . to propose, promulgate, or implement any rule or regulation" relating to full CDS repayment.[7] That language is unambiguously forward-looking. Indeed, elementary rules of statutory construction make clear that the use of the word "shall" means that the statute is to operate prospectively only.[8]

This construction is further confirmed by the long-standing rule against the retroactive application of legis-

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[6] 2A SUTHERLAND STATUTORY CONSTRUCTION § 46.01, at 73 (Sands 4th ed. 1984) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)). Petitioners' obvious dislike for the statute's "literal" meaning is an abrupt about-face from the position they asserted in the court of appeals. In the court below, they correctly described the same plain meaning rule that they now disdain as a "basic principle of statutory construction." Joint Brief for Appellees at 16, *Independent U.S. Tanker Owners Committee v. Skinner*, 884 F.2d 587 (D.C. Cir. 1989).

[7] Pub. L. No. 100-71, 101 Stat. 391, 471 (1987) (emphasis added).

[8] *See* 1A SUTHERLAND STATUTORY CONSTRUCTION 692-93 (Sands 4th ed. 1985) ("[i]t is obvious that the word 'shall,' in itself, cannot 'include' the past").

lation. As this Court held long ago, "legislation must be considered as addressed to the future, not to the past." [9] Under this Court's decisions, quoted and followed below, *see* Pet. App. 18a, "retrospective operation will not be given to a statute . . . unless such be 'the unequivocal and inflexible import of [its] terms. . . .' " [10] This rule has special force where, as here, restrictions on expenditures of appropriated funds are concerned,[11] since once money has been spent, it cannot be "unspent."

Petitioners err when they urge that the statute, when limited to its "literal" meaning, has no effect. To the

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[9] *Union Pac. R.R. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913); *see also Bowen v. Georgetown Univ. Hosp.*, 109 S. Ct. 468, 471 (1988); *United States v. Security Indus. Bank*, 459 U.S. 70, 79 (1982).

[10] *Greene v. United States*, 376 U.S. 149, 160 (1964) (quoting *Union Pac. R.R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913)). Thus, Congress may expressly provide for a statute to operate retrospectively, as in *United States v. Sperry Corp.*, 110 S. Ct. 387 (1989), a case that petitioners erroneously label "dispositive." Pet. 12 n.7. Congress in no event made Section 505 expressly retroactive.

In contrast to the situation in *Sperry*, moreover, applying Section 505 retroactively here would violate the due process clause because it would have "an extremely narrow focus" and would be aimed at a specific, identifiable economic group—the vessels that have repaid CDS. *Allied Structural Steel v. Spannaus*, 438 U.S. 234, 248 (1978); *see Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412 n.13 (1983). Avoidance of this constitutional issue—and avoidance of the separation of powers problem, also pointed out to the court below, *see* Parnell, *Congressional Interference in Agency Enforcement: The IRS Experience*, 89 YALE L.J. 1360, 1377-79 (1980)—further supports the statutory construction of the court of appeals.

[11] *TVA v. Hill*, 437 U.S. 153, 190-91 (1978). Congress' own Government Accounting Office has specifically stated that "[appropriations s]tatutes and amendments to statutes are construed to apply prospectively only (that is, from the date of enactment or other effective date if one is specified) . . . ." GAO, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 2-48 (1st ed. 1982).

contrary, the court of appeals correctly ruled that, read prospectively, the plain words of the statute have abundant meaning. Pet. App. 19a-20a. The 1987 rule extends to only four vessels, although there were numerous subsidized tankers (and non-tankers) that might have repaid CDS under a more expansive CDS payback rule. *See* 48 Fed. Reg. 4408, 4409-10 (1983). Thus, as the court of appeals noted, "section 505 could well have been intended to guard against the possibility that the Department might change its mind and enter into repayment arrangements with additional CDS vessels." Pet. App. 19a-20a.[12]

Petitioners also err in claiming that Section 505 precluded the affected vessels from operating in the domestic trade because "further agency expenditure was needed to implement the rule." Pet. 11 n.6. To the contrary, MarAd was not required to do anything at all to implement the rule. Contrary to petitioners' assertion, *id.*, Section 506 of the Act, 46 U.S.C. app. § 1118, says nothing about written CDS contract amendments; no such amendments were necessary here.[13] MarAd could, and did, simply decide unilaterally not to enforce the domestic trading restrictions in the original CDS contracts,

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[12] Likewise, the statute's reference to the vessels that had repaid CDS pursuant to the 1985 CDS payback rule has meaning when applied prospectively. If the reviewing courts had set the rule aside on any procedural or other ground curable by MarAd, then Section 505, during the period of its effectiveness, would likely have prevented the agency from taking steps to re-promulgate the rule following a court remand.

[13] Even though they were not required to do so, when the vessel owners repaid CDS on the BROOKLYN, the ARCO SPIRIT, and the ARCO INDEPENDENCE in 1985 and 1986, they entered into written contract modifications with the United States. These modifications acknowledged the repayments and deleted the domestic trading restrictions, citing "46 C.F.R. § 276.3," the CDS payback rule as codified. Because the 1987 rule simply substituted for the previous codification of the same 46 C.F.R. § 276.3, no further contract modifications would have been needed in any event.

in exchange for full CDS repayment. As the court of appeals correctly held, "because payment from the three VLCCs has already been received and because the tankers have operated domestically since 1985, the rule affirms the right of the ARCO INDEPENDENCE, ARCO SPIRIT, and BROOKLYN to remain in domestic commerce, and their contracts need not be amended to confirm this right." Pet. App. 20a.

B. Even Assuming That Resort to Legislative History Were Appropriate, the Legislative History Makes Clear That the Statute Was Intended To Apply Prospectively Only.

Because it found that there was "no ambiguity to be resolved," Pet. App. 20a, the court of appeals was also correct in refusing to base its decision on the statute's legislative history. As this Court has repeatedly made clear, "'[r]esort to legislative history is only justified where the face of the Act is inescapably ambiguous . . . .'" [14] But even if examination of legislative history were appropriate here, the legislative history shows that the statute was meant to apply prospectively only.[15]

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[14] *Garcia v. United States*, 469 U.S. 70, 76 n.2 (1984) (quoting *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395 (1951) (Jackson, J., concurring)); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring) ("Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent."); *see also United States v. Locke*, 471 U.S. 84, 95-96 (1985).

[15] In fact, the court of appeals did examine the legislative history to support its conclusion that the statute operated prospectively only. The court of appeals noted that even those legislators who believed that Section 505 operated to preclude the affected vessels from the domestic trade appear to have assumed that the legislation would do so prospectively because (they thought) MarAd had yet to take steps to implement the 1987 rule. Pet. App. 19a (citing 133 Cong. Rec. S9142 (daily ed. July 1, 1987) (remarks of Sen. Hollings); 133 Cong. Rec. H2792 (daily ed. July 8, 1987) (remarks

To the extent that the legislative intent behind Section 505 can be divined at all,[16] it makes clear that Section 505 was a compromise. A provision containing the same forward-looking language that was ultimately enacted was originally considered and adopted by the House before the 1987 rule was promulgated.[17] The Administration objected to the measure because, *inter alia*, it would require the Treasury to refund more than $100 million in repaid CDS to the vessel owners;[18] and the Senate Committee on Appropriations deleted the entire section and reported a bill without it on May 1, 1987.[19] Before the House-Senate conference began the process of reconciling the two bills, MarAd promulgated the 1987 rule in final form with an immediate effective date. As the court of appeals correctly observed, at that point "it was by no means clear that the final version of the appropriations bill would contain section 505 because the Senate had already been persuaded to drop the section from its version of the Supplemental Appropriations Act." Pet. App. 16a.

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of Rep. Carr); 133 Cong. Rec. S10,866 (daily ed. July 29, 1987) (remarks of Sen. Mikulski)). But, as the court of appeals properly concluded, Pet. App. 19a, and as we have shown in Part I.A. *supra*, those legislators were clearly mistaken in that view.

[16] As one commentator—upon whom petitioners themselves rely, *see* Pet. 13—has noted, the legislative intent behind appropriations riders (if any such "intent" even exists) is particularly difficult to discern and is not very meaningful in construing statutes. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L.J. 456, 457-58.

[17] *See* H.R. REP. No. 28, 100th Cong., 1st Sess. 120-21, 145 (1987). (The provision was Section 506 of the House bill.)

[18] *See "Statement of Administration Policy"* (Apr. 15, 1987), *contained in* Appendix A: "Administrative and Legislative Materials Relating to this Matter," Item 15 (filed in the district court Feb. 17, 1988).

[19] *See* S. REP. No. 48, 100th Cong., 1st Sess. 164 (1987).

Only after MarAd had promulgated and fully implemented the 1987 rule did the conference even consider (and then restore) the House language. But the promulgation of the rule dramatically altered the terms of the legislative debate, because Section 505, as prospectively written, no longer operated on the already-promulgated 1987 rule. Legislative proponents of permanent CDS payback could now support the language in the conference bill since, on its face, it would allow existing CDS payments to stand and would only prohibit additional repayments in the future. The language of the conference report mirrored the forward-looking language of the original House report: "The House language restored by the conference agreement prohibits . . . the Maritime Administration from using funds . . . to propose, promulgate or implement any [CDS payback] rule or regulation . . . ."[20] There is no evidence in the conference report that Congress harbored any intent to alter the forward-looking nature of the provision.[21]

Finally, the President's signing statement—which goes unmentioned in the petition for *certiorari*—confirms the purely prospective nature of Section 505:

> I have signed this bill into law based on the understanding that *because this restriction on their authority is not retroactive, it will have no effect on vessel owners who previously repaid their subsidies pursuant to a CDS repayment rule published in the Federal Register on June 22, 1987. Instead, this provision of section 505 will affect only further repay-*

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[20] H.R. CONF. REP. No. 195, 100th Cong., 1st Sess. 112 (1987). *Compare* H.R. REP. No. 28, 100th Cong., 1st Sess. 120-21, 145 (1987).

[21] Thus, as a member of the conference observed, "the deliberations and actions of the conference committee indicate that section 505 was intended to be prospective in nature." 133 Cong. Rec. E3170 (daily ed. July 30, 1987) (remarks of Rep. Regula).

> *ments by vessel owners.* Were it otherwise, a restriction on rulemaking in this area would cost the taxpayers more than $100 million in payments to vessel owners who have previously repaid their subsidies.[22]

In short, the legislative history fully supports the court of appeals' ruling that the plain words of Section 505 are to be given prospective effect only.

C. The Decision Below Does Not in Any Way Undercut Congressional Ability To Enact Substantive Legislation Through Appropriations Bills.

In an effort to transform this aspect of the case into something other than what it is—a garden-variety dispute over the plain meaning of a statute—petitioners reach out to complain that the court of appeals' decision will somehow impede congressional efforts to enact measures by means of the appropriations process. Pet. 13-14. Petitioners appear to be asking the Court to articulate different rules of construction for appropriations statutes than for other statutes. Thus, according to petitioners, and in marked contrast to the rules for construing other statutes, appropriations measures like Section 505 should not be read "literally"; rather, they should be applied retroactively despite their plain meaning.

First of all, petitioners have made no effort to show—nor could they show—that different rules of construction are called for.[23] There is plainly no reason to create any

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[22] Statement of the President Upon Signing H.R. 1827, 23 WEEKLY COMP. PRES. DOC. 800 (July 20, 1987) (emphasis added). This Court has in the past recognized the significance of presidential signing statements for interpreting statutes. *See, e.g., Bowsher v. Synar*, 478 U.S. 714, 719 n.1 (1986).

[23] They have not shown, for example, that the federal courts have had any difficulty applying appropriations statutes. Indeed, the Court of Appeals for the District of Columbia Circuit has demonstrated that it is willing to construe appropriations statutes to invalidate agency action whenever the plain statutory language supports that result. *See National Treasury Employees Union v. Devine*, 733 F.2d

special rules of construction for appropriations measures. To the contrary, the very authority relied on by petitioners cogently points out the serious problems raised when Congress uses appropriations bills to enact substantive legislation, explaining that "the appropriations process may not be conducive to sound substantive policymaking" because "appropriations are often acted on quickly, providing little opportunity for thoughtful deliberation of the issues raised by such measures." [24]

Moreover, while petitioners are surely correct that appropriations legislation may sometimes be useful to address problems of an emergency nature, Pet. 13, there was manifestly no emergency here. The 1987 rule did not change the *status quo* in any respect; three of the VLCCs in question had been in the domestic trade since 1985, and the fourth had been operating there since 1980.[25] Petitioners note that "[f]or over a decade . . . Congress . . . struggled with the authority and standards under which the Secretary may accept repayment of construction-differential subsidy." Pet. 6. If so, then as the court of appeals observed, Pet. App. 21a, Congress had ample time before, during, and after passage of Section 505—had it really wished to do so—to enact substantive legislation that might have extended to the CDS vessels at issue here.[26] It did not do so in the appropriations legislation before this Court.

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114 (D.C. Cir. 1984). The court of appeals explained at length why *Devine* is wholly distinguishable. *See* Pet. App. 16a-17a.

[24] *See* Devins, *supra* note 16, at 457, 458 (footnote omitted). It is for this reason that the House and Senate rules prohibit the inclusion of substantive riders in appropriations bills. *See* House Rule XXI, ¶¶ 2, 5; Senate Rule XVI, ¶¶ 2, 4.

[25] Thus, contrary to petitioners' view, Section 505 did not "block any transfer of tonnage." Pet. 10. As the uncontested statement of the facts in the decision below makes clear, Pet. App. 5a-6a, the "transfer of tonnage" had already long since occurred.

[26] *See* 133 Cong. Rec. E3170 (daily ed. July 30, 1987) (remarks of Rep. Regula) (noting that the conferees "could have altered that

II. THE COURT OF APPEALS' DECISION NOT TO SECOND-GUESS THE AGENCY'S DETERMINATION ON A MATTER CLEARLY COMMITTED TO AGENCY DISCRETION WAS CORRECT AND PRESENTS NO ISSUE WARRANTING THIS COURT'S REVIEW.

The court of appeals' holding that the 1987 rule was not arbitrary and capricious was correct and fully in accord with this Court's precedents.[27] The court of appeals properly rejected petitioners' argument that, instead of allowing the affected VLCCs to pay back CDS and enter the domestic trade, MarAd had no choice but to pay huge operating subsidies—in excess of $20 million annually ($5 million per vessel, *see* Pet. App. at 76a)—that would be necessary to enable those vessels to operate competitively in the foreign trade. That holding presents no important question of law meriting this Court's review.

Petitioners' claims about operating subsidy are seriously flawed. Petitioners now argue that the court of appeals erred because the statute authorizing operating subsidies, 46 U.S.C. app. § 1171(a), is "mandatory." Pet. 18. Petitioners further contend that in determining whether operating subsidies were preferable to CDS payback, MarAd was prohibited from giving any weight to the factors it considered in rejecting operating subsidies as an alternative.[28]

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section so as to specifically abrogate the final rule," but that "[t]hey made no formal attempt to do so . . . ."). Of course, overturning the rule would require the government to refund the approximately $100 million in subsidies that had been repaid under the rule, as the President noted. *See* page 13 *supra*.

[27] *See Chevron U.S.A. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[28] In rejecting the operating subsidy alternative, MarAd pointed to the "exorbitant" cost to the United States, "sound policy," the reduction of incentives for efficient vessel operation, and the coun-

First, even if supportable, petitioners' contention about operating subsidies would not undermine MarAd's conclusions about the soundness of the 1987 rule. Petitioners here focus on an extraordinarily small aspect of the policy and evidentiary issues addressed by the agency. When MarAd promulgated the 1987 rule, its statement of basis and purpose first explained how the rule would foster a "well-balanced fleet" by making vessels that were "most suitable" for the Alaska-Panama route available for that purpose. Pet. App. 69a-72a. The court of appeals found that these agency conclusions were well supported in the record. Pet. App. 11a-12a. MarAd then explained at length how the rule would promote the objectives other than "suitab[ility]" set out in Section 101 of the Act. Pet. App. 72a-86a, 95a-99a. MarAd concluded that the rule would enhance the domestic fleet, and would have no negative effect on any of the other objectives, save employment of seamen. MarAd concluded that there would be no negative impact on the foreign fleet because, if the CDS vessels in question could not operate in the domestic trade, they would be laid up or scrapped. Pet. App. 74a-81a. Thus, the appropriateness *vel non* of operating subsidies goes only to the foreign-fleet aspect of the issue before MarAd.

Second, the notion that the availability of operating subsidy must always be the answer to the problems that the affected VLCCs encounter in the foreign trade proves far too much. Indeed, it is inconsistent with the very premise of this Court's decision in *Seatrain*, which confirmed the Secretary's authority under the Act "to approve full-repayment/permanent-release transactions." 444 U.S. at 597. For the VLCC STUYVESANT in *Seatrain*, as in the case of every VLCC CDS repayment, the

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terproductive effect on United States efforts to remove anticompetitive trade practices by other governments that would flow from such massive open-ended subsidies. Pet. 18 (citing Pet. App. 76a).

provision of operating subsidies to promote the foreign trade was a theoretically available alternative. But *Seatrain* means that MarAd is free to reject that alternative and to prefer permanent CDS payback. Adoption of petitioners' argument would consign to the dustheap both the holding of *Seatrain* and the important authority it reaffirms.

Third, petitioners' claim that MarAd had an obligation to consider operating subsidies as an alternative to the 1987 CDS payback rule rests on a false premise. Petitioners assert that such an alternative should have been adopted in order to avoid "the destructive consequences to the coastwise fleet of the [VLCCs'] displacement into the domestic trade . . . ." Pet. 17-18. MarAd, of course, found that the effects of the rule on the domestic fleet as a whole would be very positive. Pet.App. 81a-84a. The "destructive consequences" of which petitioners complain are nothing more than the possible results of head-to-head competition between the VLCCs affected by the 1987 rule and petitioners' less efficient vessels. Petitioners may not like that competition, but this Court in *Seatrain* made clear that other vessels in the domestic fleet are not entitled to any special regulatory protection from competition by the VLCCs following CDS repayment.[29]

Finally, the statute does not even remotely impose a "mandatory" obligation upon MarAd to grant a request for operating subsidy, as petitioners seem to suggest. Rather, the first sentence of Section 1171(a) of the Act merely authorizes and directs the agency "*to consider*" applications for operating subsidies. Here, of course,

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[29] 444 U.S. at 589-90. As Judge Bazelon stated in his dissent in *Alaska Bulk Carriers, Inc. v. Kreps*, 595 F.2d 814, 843 (D.C. Cir. 1979), reversed in *Seatrain*:

> The only conceivable harm to the Jones Act operators is an increase in competition from an additional U.S.-flag, U.S.-built vessel. *I do not believe it is the purpose of § 506 in particular, or the Merchant Marine Act as [a] whole, to protect Jones Act operators from this type of competition.* (footnote omitted) (emphasis added).

MarAd has not failed to "consider" such applications, for none was filed.[30] Moreover, far from providing that operating subsidies *must* be granted in all circumstances where a subsidy would enable a vessel to compete in the foreign trade, the statute expressly provides that "[n]o such applications shall be approved . . . unless" the agency makes several critical determinations, including that the subsidy "is reasonably calculated to carry out effectively the purposes and policies of [the Act]."[31] As the court of appeals concluded, Pet. App 23a, the statutory framework is one that obviously accords MarAd substantial discretion in determining whether to award operating subsidies.[32]

Here, MarAd's articulated concerns were surely reasons that it could, in its discretion, properly consider in

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[30] The absence of such applications (and the absence of any authority to award operating subsidy without them) is not surprising. The Act imposes numerous restrictions on recipients of operating subsidies. Section 805(a) of the Act, 46 U.S.C. app. § 1223, for example, prohibits the payment of operating subsidy to an operator (such as respondent Atlantic Richfield Company) with any affiliate that operates vessels in the domestic trade without the Secretary's written permission. Requests for such permission are routinely opposed by existing domestic operators such as the present petitioners. *See, e.g., Puerto Rico Maritime Shipping Auth. v. Dole*, 619 F. Supp. 312 (D.D.C. 1985), *vacated as moot*, 825 F.2d 502 (D.C. Cir. 1987).

[31] 46 U.S.C. app. § 1171(a)(4). Section 1173(a) of the Act, which petitioners ignore, further provides that "[i]f the Secretary of Transportation approves the application, he *may* enter into a contract with the applicant for the payment of [operating subsidies]. . . ." (emphasis added).

[32] In the *Seatrain* case itself, this Court emphasized the Secretary's broad "discretion to administer the Act." 444 U.S. at 573; *see also United States Marine Int'l, Inc. v. Peterson*, 518 F.2d 1070, 1079 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 912 (1976) (in operating subsidy determinations, agency "has broad discretionary authority to deal with the ever changing technological and economic conditions of the commercial shipping industry . . . ."). Petitioners cite no case authority for their erroneous assertion that the award of operating subsidy is mandatory.

concluding that massive operating subsidies would not be an appropriate alternative to the 1987 CDS payback rule. Petitioners' assertion that cost is always an improper consideration for MarAd (even when, in this era of federal budgetary constraints, the subsidy would amount to more than $20 million per year) is untenable; it is inconsistent with MarAd's obligation to ensure that no operating subsidy is awarded unless it is "reasonably calculated to effectively" accomplish the purposes of the Act. Determinations that such huge subsidies would eliminate incentives for efficient operation of vessels and might trigger counterproductive anti-competitive reactions by other nations (including subsidies for competing foreign-flag vessels that would directly undercut the very effectiveness of the operating subsidy itself) likewise fall well within the expert discretion of MarAd and the Secretary.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1989

INDEPENDENT U.S. TANKER OWNERS COMMITTEE, ET AL., PETITIONERS

v.

SAMUEL K. SKINNER, SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 505 of the Supplemental Appropriations Act of 1987, Pub. L. No. 100-71, 101 Stat. 471, prohibited the Secretary of Transportation from applying the June 1987 maritime construction subsidy repayment rule to allow four oil tankers to participate in the domestic oil trade.

2. Whether the court of appeals properly determined that the Secretary of Transportation did not exceed his authority under the Merchant Marine Act, 1936, 46 U.S.C. 1101 *et seq.*, in promulgating the June 1987 maritime construction subsidy repayment rule.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	10
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Adickes v. *S.H. Kress & Co.*, 398 U.S. 144 (1970)	12
Bowen v. *Georgetown Univ. Hosp.*, 109 S. Ct. 468 (1988)	11
Hallstrom v. *Tillamook County*, 110 S. Ct. 304 (1989)	12
Independent U.S. Tankers Comm. v. *Dole*, 809 F.2d 847 (D.C. Cir.), cert. denied, 484 U.S. 819 (1987)	5, 9
Independent U.S. Tanker Owners Comm. v. *Lewis*, 690 F.2d 908 (D.C. Cir. 1982)	4
Seatrain Shipbuilding Corp. v. *Shell Oil Co.*, 444 U.S. 572 (1980)	2, 3
United States v. *Lovasco*, 431 U.S. 783 (1977)	12
United States v. *Sperry Corp.*, 110 S. Ct. 387 (1989)	11

Statutes and regulation:

Administrative Procedure Act, 5 U.S.C. 551 *et seq.*:	
5 U.S.C. 553(c)	4
5 U.S.C. 553(d)	6
5 U.S.C. 553(d)(1)	8
5 U.S.C. 553(d)(3)	8
Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, Pub. L. No. 99-93, § 502, 99 Stat. 438	11
Maritime Act of 1981, § 2, 46 U.S.C. 1601	2

Statutes and regulation—Continued: Page

Merchant Marine Act, 1936, 46 U.S.C. 1101 *et seq.*:
§ 207, 46 U.S.C. 1117 3
§ 504, 46 U.S.C. 1154 3
§ 506, 46 U.S.C. 1156 2-3,
§ 601(a), 46 U.S.C. 1171(a) 12, 13
§ 603(a), 42 U.S.C. 1173(a) 13
§ 603(b), 46 U.S.C. 1173(b) 12
Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1984, Pub. L. No. 98-166, 97 Stat. 1077 (1983) 5
Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1985, Pub. L. No. 98-411, 98 Stat. 1551 (1984) 5
Department of Transportation and Related Agencies Appropriations Act, 1984, Pub. L. No. 98-78, § 315, 97 Stat. 472 (1983) 5
Supplemental Appropriations Act, 1987, Pub. L. No. 100-71, § 505, 101 Stat. 471 ..... 6, 7, 8, 9, 10, 11-12
49 C.F.R. 1.4(j)(1) 2

Miscellaneous:

133 Cong. Rec.:
p. E3170 (daily ed. July 30, 1987) 12
p. S9142 (daily ed. July 1, 1987) 12
45 Fed. Reg. (1980):
p. 68,393 5
p. 68,394 5
50 Fed. Reg. (1985):
p. 19,173 5
p. 19,178 5
52 Fed. Reg. (1987):
p. 12,199 6
p. 12,202 6
p. 23,522 ..... 6, 13
p. 23,524 5

Miscellaneous—Continued: Page

p. 23,528 13
p. 23,536 6
H.R. Conf. Rep. No. 195, 100th Cong., 1st Sess. (1987) 12
President's Statement on Signing H.R. 1827 into Law, 23 Weekly Comp. Pres. Doc. 800 (July 11, 1987) 7

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 884 F.2d 587. The decision of the district court (Pet. App. 25a-46a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 1989. Petitions for rehearing were denied on November 2, 1989. Pet. App. 22a. The peti-

tion for a writ of certiorari was filed on January 31, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. As this Court has noted, "[t]he costs of constructing ships in American shipyards and manning them with American crews are higher than comparable costs in foreign ports. Accordingly, Congress has taken a number of steps to protect and support the United States' shipping and shipbuilding industries." *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572, 574 (1980). In the Merchant Marine Act of 1936, 46 U.S.C. 1101 *et seq.*, Congress "established a number of programs to help American vessels compete effectively in foreign trade with vessels constructed and staffed abroad." *Seatrain Shipbuilding Corp.*, 444 U.S. at 575. One such program authorizes the Secretary of Transportation to subsidize construction costs for ships built in American shipyards;[1] the subsidy is known as a "construction-differential subsidy" (CDS). In order to receive a CDS, the owner of a vessel must agree to operate the vessel "exclusively in foreign trade, or on a round-the-world voyage * * *." 46 U.S.C. 1156.[2]

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[1] The Maritime Administration (MarAd) oversees the merchant marine. See 49 C.F.R. 1.4(j)(1). MarAd was originally located within the Department of Commerce. In 1981, Congress transferred the agency to the Department of Transportation, and thus the Secretary of Transportation currently exercises jurisdiction over shipping matters. See 46 U.S.C. 1601; Pet. App. 4a-5a.

[2] That condition is subject to limited exceptions. For example, a CDS-built ship may sail in the domestic trade on the first or last leg of certain overseas voyages. See 46 U.S.C.

The Act authorizes the Secretary, in his discretion, to evaluate, approve, or reject CDS applications and contracts. See, *e.g.*, 46 U.S.C. 1154. And the Act generally empowers the Secretary to "enter into such contracts, upon behalf of the United States, * * * as may, in * * * his discretion, be necessary to carry on the activities authorized by this chapter, or to protect, preserve, or improve the collateral held by the * * * Secretary to secure indebtedness * * *." 46 U.S.C. 1117.

2. a. Beginning in the mid-1970s, MarAd, reacting to the changing conditions in the world's oil market, sought to enable certain CDS-built vessels—very large crude oil carriers (VLCCs)—to participate in the domestic oil trade, principally "carry[ing] Alaskan oil to Panama where it is transshipped to Atlantic and Gulf Coast ports." Pet. App. 4a. In the late 1970s, the Secretary approved, on a case-by-case basis, contracts that permitted CDS-built vessels to enter the domestic trade once the CDS subsidies they had previously received had been repaid in full. In *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, *supra*, this Court held that the Merchant Marine Act "empowers the Secretary to approve [such] full-repayment/permanent-release transactions." 444 U.S. at 597.

b. In that decision's wake, the Secretary published and made immediately effective on October 15, 1980, an interim rule that limited the full CDS repayment option to certain types of large vessels. The rule fur-

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1156. The Secretary may also permit a CDS-built ship to "operate domestically for a maximum of six months per year provided that the vessel repays a *pro rata* share of the subsidy." Pet. App. 3a; see 46 U.S.C. 1156. In order to invoke that exception, the Secretary must determine that the transfer to the domestic trade "is necessary or appropriate to carry out the purposes [of the Act]." 46 U.S.C. 1156.

ther provided that the Secretary "would only accept repayment in 'exceptional circumstances' after a determination that the vessels had little prospect for viable employment in foreign trade over an extended period." Pet. App. 4a-5a (quoting 45 Fed. Reg. 68,393, 68,394 (1980)). About one month later, the Secretary approved repayment and return to domestic service for the VLCC *Bay Ridge*. After it repaid its subsidy, the *Bay Ridge* began operating domestically. Pet. App. 5a.

c. In the meantime, petitioners, the Independent U.S. Tanker Owners Committee and several domestic shipping firms, challenged the Secretary's action under the interim rule.[3] In *Independent U.S. Tanker Owners Comm.* v. *Lewis*, 690 F.2d 908, 918-920 (D.C. Cir. 1982) (*ITOC I*), the court of appeals acknowledged that the Secretary had statutory authority to promulgate a CDS repayment rule, but held that he had not provided an adequate "general statement of [the rule's] basis and purpose" as required by the Administrative Procedure Act, 5 U.S.C. 553(c). The court therefore vacated the Secretary's interim rule and remanded for further proceedings; the court nevertheless permitted the *Bay Ridge* to continue operating domestically pending the outcome of those proceedings. 690 F.2d at 931.

3. a. In May 1985, the Secretary published his final CDS repayment rule permitting any U.S. flag tanker

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[3] As the court of appeals noted at the inception of this prolonged litigation, petitioner Independent U.S. Tankers Owners Committee "is composed of owners and operators of nonproprietary, unsubsidized tanker vessels, many of which are operating in the carriage of crude oil from Alaska to points in the U.S. [Petitioner's] members are, thus, directly affected by any new entrants to that trade." *Independent U.S. Tanker Owners Comm.* v. *Lewis*, 690 F.2d 908, 916 (D.C. Cir. 1982).

to participate in the domestic trade upon repayment of the unamortized amount of its CDS, plus interest compounded from the date of the payment of the subsidy. 50 Fed. Reg. 19,178 (1985).[4] That rule allowed repayment for only a one-year period, that is, through June 6, 1986, in order to minimize any uncertainty in the domestic fleet and shipbuilding industry. See *id.* at 19,173. During that period, only three VLCCs took advantage of the rule—the *Arco Independence*, the *Arco Spirit*, and the *Brooklyn*. Pet. App. 5a. The Secretary permitted those tankers to operate domestically after the owners repaid a total of $105.8 million in CDS and interest. See 52 Fed. Reg. 23,524 (1987).

b. Petitioners also challenged the Secretary's May 1985 rule. In *Independent U.S. Tankers Comm.* v. *Dole*, 809 F.2d 847, 851 (D.C. Cir.) (*ITOC II*), cert. denied, 484 U.S. 819 (1987), the court of appeals again vacated the rule, concluding that the Secretary had not provided a "sufficiently reasoned discussion of why [the] rule was adopted and alternatives were rejected in light of the purposes of the Merchant Marine Act." The court of appeals, however, stayed its mandate until July 16, 1987, both to avoid disruptions in the domestic trade and to give the Secretary the opportunity to "address the problems of the merchant marine trade." *Id.* at 855. Consequently, the three VLCCs affected by the May 1985 rule continued to operate in the domestic fleet.

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[4] The Secretary had issued his proposed rule in January 1983. See 48 Fed. Reg. 4408 (1983). Through successive appropriations riders, however, Congress prevented the Secretary from adopting that rule as final. See Pub. L. No. 98-78, § 315, 97 Stat. 472 (1983); Pub. L. No. 98-166, 97 Stat. 1077 (1983); Pub. L. No. 98-411, 98 Stat. 1551 (1984). The last rider, by its terms, expired on May 15, 1985.

c. In April 1987, the Secretary published a notice of rulemaking, proposing to reaffirm the allowance of CDS repayment and rescission of the domestic trading restriction only for the three tankers that MarAd had approved under the May 1985 rule—the *Arco Independence*, the *Arco Spirit*, and the *Brooklyn*—as well as the tanker that MarAd had approved under the prior October 1980 rule—the *Bay Ridge*. 52 Fed. Reg. 12,199, 12,202 (1987). In other words, the proposed rule applied only to those vessels that were already operating in the domestic trade on a full-time basis as a result of prior rules.

On June 22, 1987, the Secretary issued the final rule, which was accompanied by a comprehensive statement of its basis and purpose and an analysis of the comments received and alternatives considered. 52 Fed. Reg. 23,522 (1987). The Secretary made the rule effective immediately upon publication, invoking the "good cause" exception to the 30-day waiting period required by the Administrative Procedure Act, 5 U.S.C. 553(d). See 52 Fed. Reg. 23,536 (1987).

4. Meanwhile, Congress had begun work on a rider to an appropriations bill that was designed to bar CDS repayment arrangements. Pet. App. 6a. After promulgation of the Secretary's June 1987 final rule, Congress enacted Section 505 of the Supplemental Appropriations Act, 1987, Pub. L. No. 100-71, 101 Stat. 471. Section 505 expressly provides that no appropriated Merchant Marine Act funds

> shall be used * * * to propose, promulgate, or implement any rule or regulation, or, with regard to vessels which repaid subsidy pursuant to the [1985] rule * * * conduct any adjudicatory or other regulatory proceeding, execute or perform any contract, or participate in any judicial action with respect to the repayment of construc-

> tion differential subsidy for the permanent release of vessels from the restrictions in Section 506 of the Merchant Marine Act * * *.

Ibid. The President signed the Supplemental Appropriations Act on July 11, 1987. Pet. App. 6a.[5]

5. In June 1988, petitioners returned to the district court and challenged the Secretary's June 1987 rule on a number of grounds, including that the rule lacked an adequate statement of basis and purpose, conflicted with the purposes of the Merchant Marine Act, and violated Congress's prohibition on further subsidy repayments in Section 505 of the Supplemental Appropriations Act of 1987. Pet. App. 26a-27a.

On cross-motions for summary judgment, the district court vacated the Secretary's June 1987 rule and ordered that "any vessel operating in the domestic trade of the United States pursuant to [that] rule * * * be removed from that trade as soon as is practical." Pet. App. 48a. Turning to the legal effect of the appropriations rider, the court observed that "[r]ather than permit the agency the opportunity to reconcile the rule with the [Merchant Marine] Act, Congress moved decisively to end the rulemaking altogether." *Id.* at 28a. The court further noted that the "agency knew that Congress opposed CDS repayment and that it was in the process of legislating that opposition." *Ibid.* In these circumstances, the court determined, "[t]he agency's attempt to outrace Con-

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[5] In approving the legislation, the President stated that he "signed this bill into law based on the understanding that because this restriction on [the Secretary's] authority is not retroactive, it will have no effect on vessel owners who previously repaid their subsidies pursuant to a CDS repayment rule published in the *Federal Register* on June 22, 1987." President's Statement on Signing H.R. 1827 into Law, 23 Weekly Comp. Pres. Doc. 800 (July 11, 1987).

gress on this issue cannot be given effect." *Ibid.* The court therefore concluded that "Congress clearly intended to bar promulgation of any rule authorizing CDS repayment as of January 16, 1987 through enactment of Section 505 of the Supplemental Appropriations Act of 1987." *Id.* at 33a.

The district court also concluded that the Secretary's June 1987 rule was "arbitrary, capricious, an abuse of discretion or not otherwise in accordance with law." Pet. App. 35a. The court found that the Secretary had adopted the rule principally for economic reasons, *i.e.*, based on a determination that "the advantages of efficiency and transportation saving outweigh[ed] the net adverse impact on vessels and seam[e]n in the domestic trade." *Id.* at 36a. Those factors, however, are "not among the enumerated objectives of the Merchant Marine Act." *Id.* at 37a. The court found that "the evidence in the record strongly suggests that the challenged rule will not further directly many of the objectives of the Merchant Marine Act," *id.* at 39a, and concluded that the Secretary could not rely on "nonstatutory criteria at the expense of the objectives of the Merchant Marine Act," *id.* at 41a.[6]

6. The court of appeals reversed. Pet. App. 1a-21a.[7] The court of appeals concluded that the Secre-

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[6] The district court also concluded that the Secretary lacked "good cause" to waive the 30-day waiting period under 5 U.S.C. 553(d)(3). Pet. App. 42a-45a. The court of appeals did not reach that issue, holding that the Secretary, under 5 U.S.C. 553(d)(1), had authority to make the rule effective upon publication. Petitioners have not sought further review of that aspect of the court of appeals' judgment.

[7] The court of appeals had stayed the district court's order pending disposition of the appeal.

tary "has cured the shortcomings * * * identified in *ITOC II* and provided a sufficient statement of basis and purpose for the 1987 rule." *Id.* at 15a. The court accepted the Secretary's concession that "the rule will result in some reduction in employment," and reiterated that the Secretary "may not be able to pursue all of the [Merchant Marine] Act's goals simultaneously." *Ibid.* (citing *ITOC II*, 809 F.2d at 854 n.4). The court also found that "while others might interpret the evidence in different ways, the [Secretary's] conclusions have adequate support in the record." Pet. App. 15a. The court therefore held that the Secretary "acted neither arbitrarily nor capriciously, but in full accord with [his] legal responsibilities and the purposes of the [Merchant Marine] Act." *Id.* at 16a.

Turning to the effect of the appropriations rider, the court of appeals first dismissed the district court's suggestion that the June 1987 rule "must be set aside because MarAd had advance notice of congressional opposition to CDS repayments." Pet. App. 16a. The court observed that "it was by no means clear that the final version of the appropriations bill would contain section 505 because the Senate had already been persuaded to drop the section from its version of the Supplemental Appropriations Act." *Ibid.* And the court emphasized that "we know of no principle that holds that the executive branch must stay its hand whenever it learns that the legislative branch may change the law." *Ibid.*

The court of appeals next rejected the district court's conclusion that Section 505 barred the June 1987 rule, "find[ing] it difficult to reconcile the district court's interpretation with the plain language and stated purpose of [that provision]." Pet. App. 19a. The court concluded that Section 505's spending prohibition "is inherently prospective as the language

does not purport to reach expenditures already made." *Ibid.* The record showed that the Secretary's self-executing rule became final before Congress enacted Section 505 and required no additional expenditure of appropriated funds. As a result, the court concluded that Section 505 "neither retrospectively voids the 1987 rule nor prevents it from becoming fully operational." *Id.* at 21a.[8]

ARGUMENT

1. Petitioners renew their contention (Pet. 9-15) that Section 505 of the Supplemental Appropriations Act of 1987 prohibited the Secretary from applying the June 1987 maritime construction subsidy repayment rule to allow four oil tankers to participate in the domestic oil trade. The language of Section 505 forecloses that argument. By its terms, the statute provides that none of the appropriated funds "shall be used * * * to propose, promulgate, or implement any rule or regulation" with respect to the repayment of subsidies in order to permit CDS vessels to operate domestically. 101 Stat. 471. As the court of appeals correctly noted, Section 505 "operates exclusively as a restriction on the expenditure of appropriated funds. Such a prohibition is inherently prospective as the language does not purport to reach expenditures already made." Pet. App. 19a.[9]

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[8] One week after petitioners filed their petition for a writ of certiorari in this Court, petitioner Overseas Shipholding Group, Inc., on February 8, 1990, filed in the court of appeals a motion to recall and modify the mandate. That motion remains pending before that court.

[9] Petitioners' position is also inconsistent with the well-established principle that "congressional enactments * * * will

Moreover, the record shows, and petitioners do not seriously dispute, that the June 1987 rule was self-executing and became final before Congress enacted Section 505. That rule required no expenditure of appropriated funds—after July 11, 1987—in order to become effective. Thus, there was no expenditure of Merchant Marine Act funds to "conduct any adjudicatory or other regulatory proceeding, execute or perform any contract, or participate in any judicial action with respect to the repayment of construction differential subsidy" for the vessels covered by the 1987 rule. As the court of appeals found, "because payment from the three VLCCs has already been received and because the tankers have operated domestically since 1985, the rule affirms the right of [those tankers] to remain in domestic commerce, and their contracts need not be amended to confirm this right." Pet. App. 20a.[10] In other words, Section 505, by its terms, did not affect actions already taken by the Secretary on June 22, 1987—the effective date of the rule. For that reason alone, petitioners' attack

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not be construed to have retroactive effect unless their language requires this result." *Bowen* v. *Georgetown Univ. Hosp.*, 109 S. Ct. 468, 471 (1988). Nor can petitioners take refuge (Pet. 12 n.7) in *United States* v. *Sperry Corp.*, 110 S. Ct. 387, 396-397 (1989), since the law at issue there—Section 502 of the Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, Pub. L. No. 99-93, 99 Stat. 438—unlike Section 505 of the Supplemental Appropriations Act of 1987, by its terms applied retroactively.

[10] Petitioners suggest in passing (Pet. 11-12 n.6) that the Secretary needed to take further action after June 22, 1987, in order to allow the tankers to operate domestically. The court of appeals, however, determined that the record contradicts that suggestion. See Pet. App. 20a.

(Pet. 12) on the "literalism" of the court of appeals is particularly inappropriate.[11]

2. Petitioners also contend (Pet. 15-20) that the June 1987 rule should be vacated because the Secretary did not consider a reasonable alternative to that subsidy repayment rule. Specifically, petitioners note that Sections 601(a) and 603(b) of the Merchant Marine Act, 46 U.S.C. 1171(a) and 1173(b), authorize the payment of operating subsidies to tankers to enable them to remain in the foreign trade, and contend that the Secretary should have considered granting such subsidies with respect to the four tankers at issue here. Petitioners, however, did not raise this issue in the court of appeals, and they have therefore not preserved it for review. *E.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In any event, petitioners' claim rests on two mistaken premises. First, the record shows that the Secretary did consider, but ultimately rejected, the alter-

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[11] This is not a case where the pertinent legislative history shows that "the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *Hallstrom* v. *Tillamook County*, 110 S. Ct. 304, 310 (1989) (internal quotation marks omitted). The legislative history of Section 505 is at best inconclusive. See, *e.g.*, H.R. Conf. Rep. No. 195, 100th Cong., 1st Sess. 112 (1987); compare 133 Cong. Rec. E3170 (daily ed. July 30, 1987) (statement of Rep. Regula) (The House and Senate conferees intended that "[Section] 505 would be prospective in nature and would not in any way effect the legal viability of the final [June 1987] rule.") with 133 Cong. Rec. S9142 (daily ed. July 1, 1987) (statement of Sen. Hollings) (The conferees had specifically intended to thwart the Secretary's efforts to allow tankers that had already repaid their subsidies to operate domestically.).

native petitioners now propose. Full subsidy to the four tankers involved here would have cost the federal government "$5 million annually per ship"—an amount the Secretary determined to be "exorbitant" and incompatible with federal budgetary limitations. 52 Fed. Reg. 23,522, 23,528 (1987). The Secretary further found that, if he provided such subsidies, "[t]here would be no incentive for efficient operation and the Government would become the guarantor of profitable operation." *Ibid.* The Secretary determined that "the trade ramifications of such a massive open-ended subsidy could prove totally counterproductive at a time when the United States is seeking to remove other anticompetitive trade measures by our trading partners." *Ibid.*

Second, the pertinent provisions of the Merchant Marine Act, by their terms, do not require the Secretary to provide operating differential subsidies on demand. Section 603(a) of the Act, 46 U.S.C. 1173(a), provides that the Secretary "*may* enter into a contract with the applicant for the payment of an operating-differential subsidy determined in accordance with the provisions of subsection (b) of this section * * *" (emphasis added). And Section 601(a) of the Act, 46 U.S.C. 1171(a), makes plain that "[n]o such application [for a subsidy] shall be approved by the Secretary * * * unless he determines that," among other things, "the granting of the [subsidy] * * * is reasonably calculated to carry out effectively the purposes and policy of this chapter." Thus, there is no warrant for petitioners' suggestion (Pet. 18) that the provision for operating subsidies is mandatory.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1990

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* The Solicitor General is disqualified in this case.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

INDEPENDENT U.S. TANKER OWNERS COMMITTEE, *et al.*,
Petitioners,

v.

SAMUEL K. SKINNER, SECRETARY OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. SECTION 505	1
II. THE MERCHANT MARINE ACT	7

TABLE OF AUTHORITIES

Cases Page

Bread Political Action Committee v. FEC, 455 U.S. 577 (1982) 4
Crandon v. United States, 110 S. Ct. 997 (1990) 3
National Treasury Employees Union v. Devine, 733 F.2d 114 (D.C. Cir. 1984) 5, 6
Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572 (1980) 1, 6
Shell Oil Co. v. Iowa Dept. of Revenue, 109 S. Ct. 278 (1988) 4

Statutes

Merchant Marine Act, 1936
§ 101, 46 App. U.S.C. § 1101 ..... 8, 9
§ 506, 46 App. U.S.C. § 1156 6
§ 601(a), 46 App. U.S.C. § 1171(a) 7, 8
Supplemental Appropriations Act, 1987, Pub. L. 100-71, § 505, 101 Stat. 391, 471 (1987) 2, 6

Legislative Materials

H.R. Conf. Rep. No. 195, 100th Cong., 1st Sess. 112 (1987) 4
133 Cong. Rec. S9142 (daily ed. July 1, 1987) (remarks of Sen. Hollings) 4, 5
133 Cong. Rec. E3170 (daily ed. July 30, 1987) (remarks of Rep. Regula) 4

Other Authorities

Commission on Merchant Marine and Defense, *Third Report to Congress* 54 (Sept. 1988) 8
Construction-Differential Subsidy Repayment; Total Payment Policy, 50 Fed. Reg. 19170 (May 7, 1985) 9

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REPLY BRIEF FOR PETITIONERS

Petitioners Independent U.S. Tanker Owners Committee, *et al.*, reply to the briefs in opposition to the petition for a writ of certiorari.[1]

I. SECTION 505

Petitioners' first question asks whether an appropriations rider, cast in typical form as a prohibition literally

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[1] On April 9, 1990, the court of appeals recalled and modified its mandate, reaffirming its judgment of August 22, 1989, in all respects, but remanding to the district court for resolution of a distinct claim under the National Environmental Policy Act not addressed by the district court or court of appeals. The remand expressly does not disturb the distinct statutory claims decided by the court of appeals, and those claims are properly before this Court. *See Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 580-81 (1980).

against expenditure from appropriated funds but designed by Congress to preclude a specific agency rule then under consideration, must be given its intended effect even if the rule issues just before the bill passes.

The answer of federal respondents seems to be that such a rider is to be read literally except where "literal application of a statute will produce a result demonstrably at odds with the intentions of the drafters". They then argue that this is not such an exception, or in other words that the question is not presented here. Fed. Opp. 12 note 11 [citation omitted]. On the other hand, Arco et al. (hereafter Arco), pressing for the literal meaning, contend that petitioners are seeking "different rules of construction" by which appropriations would "be applied retroactively despite their plain meaning". Arco Opp. 13.[2]

A. That this case fairly presents the question is evident from the decision below, which rested its conclusion that Congress did not intend to preclude entry of the particular ships precisely on the form of § 505 as a limitation of expenditure which "inherently" operates for the future. Pet. App. 19a. And that the real intention of Congress was to preclude their entry is facially apparent. Section 505 specifically said that the ships previously admitted under the rule invalidated by *ITOC II* —that is, these ships—were not now to be admitted

[2] Unlike the federal respondents, Arco argues that legislation by appropriation act is bad practice in which Congress should not be encouraged by adopting anything but the most literal reading, and that even if (as it concedes may happen) there may occasionally be a requirement to employ it for emergency action, this was not such a case. Arco Opp. 13-14. The propriety of the practice as such may safely be left to Congress; but the time frame that the agency imposed, 83 days from proposal to promulgation with immediate effectiveness even as the conference committee was meeting, sufficiently vindicates the judgment of both courts below, Pet. App. 29a; 16a, that an unseemly race was being run against Congress, and of Congress itself that the fastest legislative track was required.

whether by rule, adjudication or other process, or by contract. What was the point of such specific reference to them, practically by name, and with such elaboration of prohibitions against any conceivable form of agency action to admit them, if Congress thought they were already in? If Congress thought that, what "future" application did it intend for a prohibition against admitting them at all? [3] The intention to exclude the particular ships is inexpugnable. If this is not "plain meaning" the concept has no content.[4]

Federal respondents suggest that the legislative history is "inconclusive" on the meaning of the statute, Fed. Opp. 12 note 12, while Arco says it "makes clear" a "prospective" application only. Arco Opp. 10 ff. Both statements are wrong.

The Government's suggestion of inconclusiveness derives from comparing the conference report with statements by Senator Hollings and Representative Regula. It does not say how it counted the conference report (see infra), but the Senator is correctly cited as saying the conferees intended to exclude the ships, and the Representative as saying the opposite. But the citation shows

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[3] Conforming to "the ancient and sound rule of construction that each word in a statute should, if possible, be given effect", and that "An interpretation that needlessly renders some words superfluous is suspect", *Crandon v. U.S.*, 110 S. Ct. 997, 1008 (1990) (Scalia, J., concurring), Arco attempts to give an alternative "forward-looking" meaning to this prohibition, Arco Opp. 9 note 12, but it merely underscores the point: if the intention was to let the ships remain, why should Congress forbid further agency action "on remand" to do so?

[4] Arco charges petitioners with abandoning their reliance on plain meaning, Arco Opp. 7 note 6, but it confuses literalism with plain meaning. As in many other contexts, the *literal* reading here that no money is to be spent to allow entry of subsidized ships into domestic trade must not obscure the *plain* meaning that subsidized ships (specifically including the ships covered by the rule) are not to be allowed in.

on its face that Senator Hollings' statement was made in debate on July 1, 1987, when the bill passed the Senate, while Representative Regula's was made July 30, a month after the House action on June 30, and in the form of an extension of remarks printed in the appendix to the Congressional Record. The Court attaches little weight to post-debate statements, *Bread Political Action Committee v. FEC*, 455 U.S. 577, 582 note 3 (1982) and cases cited, and especially of an opponent (as Representative Regula says he was) seeking to gloss legislation he vainly opposed. *Shell Oil Co. v. Iowa Dept. of Revenue*, 109 S.Ct. 278, 284 (1988).

As for the conference report, Arco can cite it as "forward-looking", Arco Opp. 12, only by an unwarranted interpolation and some astonishing ellipses that entirely change its character.[5] With the ellipses restored, it makes incontrovertible the intention—consistently

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[5] The report reads in full (emphasis added): "Amendment No. 419: Restores language proposed by the House and stricken by the Senate, with a change in the first section number from '506' to '505'. The House language restored by the conference agreement prohibits the Department of Transportation or the Maritime Administration from using funds appropriated or made available by this or any other Act or otherwise appropriated or made available to the Secretary of Transportation or the Maritime Administration for purposes of administering the Merchant Marine Act, 1936, as amended, *to propose, promulgate or implement any rule or regulation concerning vessels which repaid subsidy under the rule issued by the Secretary of Transportation on May 3, 1985, and vacated by the U.S. Court of Appeals for the District of Columbia on January 16, 1987*; conduct any adjudicatory proceeding; execute or perform any contract; or participate in any judicial action concerning repayment of construction differential subsidy for the permanent release of vessels from the restrictions in section 506 of the Merchant Marine Act of 1936, as amended. The language also provides that the restrictions on the use of such funds do not apply to the extent that such expenditures relate to a rule which conforms to statutory standards hereafter enacted by Congress. The Senate bill contained no provision on this matter." H. Conf. Rep. No. 195, 100th Cong., 1st Sess. 112 (1987).

with the debate and the statutory language—to exclude the specific vessels.[6]

B. Did then Congress fail to accomplish its purpose because the bill became law 19 days after the rule purported to admit them?

The court of appeals conceded that Congress could simply have directed the agency to withdraw the rule. Pet. App. 21a.[7] In a statute of that form, all arguments about completed administrative action requiring no further proceedings or expenditures fall to the ground; Congress could not be outraced but had only to specify the action it wished canceled.

But once this is conceded, the form of the statute is obviously immaterial: it is always the substantive Congressional intention that must be respected. The question is merely what Congress intended in this law.

We have shown above that what Congress intended was to exclude these ships. The law is clear that this intention must be obeyed, whether or not there remained administrative action to be performed or expenditures to be made.

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[6] Arco further contends that § 505 cannot refer to the ships named in the rule because its language, originally passed by the House *before* the rule issued, was not changed in conference *after* the rule issued. No change was required. In *Nat. Treasury Emp. Union v. Devine*, 733 F.2d 114, 117 (D.C. Cir. 1984), the court of appeals dealt with an identical situation and held that Congress' omission to change the language reflected its judgment that the original language sufficiently covered any change in the final rule, pointing to the same word that appears here: "implement". Here, Senator Hollings gave exactly this explanation in the colloquy cited by the federal respondents, 133 Cong. Rec. S9142 (daily ed. July 1, 1987).

[7] The court therefore saw no such constitutional issue of retroactivity as Arco vaguely suggests. Arco Opp. 8 note 10.

In one obvious sense, there remained technical things to be done;[8] but § 505 precludes *implementation* of the payback rule and *performance* of any contract thereunder. Surely the rule is being implemented when the ships by virtue of the rule continue to operate in domestic trade. Surely a contract is being performed when by virtue of the contract previously made, the ships continue so to operate. It will not do to say that the agency had no function but to promulgate the rule or execute the contract, and that these thereupon became self-effectuating. The content of "implement" and "perform" lay, as respondents rightly concede, Arco Opp. 9, in not enforcing the trading restrictions of § 506 of the 1936 Act. As in *Nat. Treasury Emp. Union v. Devine*, 733 F.2d 114, 120 (D.C. Cir. 1984), the prohibition extends "to block *any* further implementation, administration or enforcement of the regulations" by anyone, and the regulations "are therefore without any effect whatsoever" during the effective period of the law, which in this case extends until further Congressional action.[9]

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[8] Arco makes the extraordinary assertion that although § 506 of the 1936 Act requires every owner of a ship built with construction subsidy to agree by contract to operate it exclusively in foreign trade, no amendment is required to release this restriction because § 506 "says nothing about written CDS contract amendments". Arco Opp. 9. It says nothing about payback either, an omission that did not prevent this Court from finding it implicit in the agency's contracting power itself. *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572 (1980). So far as can be ascertained, this is the first instance in which an enlargement of operating limitations in a subsidy contract has not been reduced to writing, and respondents themselves are obliged to concede that under the prior repayment rule (and, indeed, under both prior repayment rules) the agency did execute formal amendments. The proposition that "MarAd could, and did, simply decide unilaterally not to enforce the domestic trading restrictions in the original CDS contracts" has only to be stated to carry its own refutation.

[9] The holding below is squarely in conflict with that court's own previous approach in *Devine*. Although holding that further agency action was there required, it said that even had that not been the

II. THE MERCHANT MARINE ACT

Petitioners' second question addresses the agency's declination to consider granting operating subsidy to the ships for operation in the foreign trade for which they were built instead of turning them into the overtonnaged domestic trade. The Solicitor General is entirely mistaken in asserting that petitioners did not preserve this issue before the court of appeals, whose opinion expressly recites that they did so, Pet. App. 13a: they also raised it before the agency, J.A. 677, 701-702, which rejected it, Pet. App. 76a; in the district court, which accepted their argument, Pet. App. 42a; and in the court of appeals, which as said expressly recites their contention in overruling the district court (although with evident doubt), supra.

On the merits, federal respondents do little more than recite with minor embellishment the reasons the agency gave for refusing to consider subsidy. The question is not whether it passed on the issue. Of course it did. But respondents do not at all address petitioners' contention that these reasons are not the statutory reasons for rejecting this alternative. As the district court said, Pet. App. 42a, "The rejection of the ODS option is never discussed by the agency in terms of how it helps or hinders the objectives of the Merchant Marine Act." The court of appeals said that subsidy costs are obviously an intended expense "to achieve the explicit congressional objective", and only deferred to the agency on the ground that courts cannot decide when subsidies are to be awarded. Pet. App. 14a. Respondents do not face the issue, although they explicitly acknowledge (Fed. Opp. 13) that § 601(a), 46 App. U.S.C. § 1171(a), makes the purposes and policy of the act the controlling standard,

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case, and even could the regulations have been implemented by other agencies without supervision by the issuing agency, they could not be allowed to take effect against the obvious Congressional intention, also expressed in an appropriations rider, that they should be totally arrested pending—as here—further legislative study.

as the district court held. They make no attempt to establish that the agency or the court below applied that standard.[10]

Apart from adjectival embellishments, such as characterizing as "huge" the estimated $5 million annual subsidy per vessel,[11] Arco's position is answered in the same way. In urging that § 601(a) is mandatory, petitioners do not suggest that the agency was required to give subsidy: they merely say that § 601(a) requires it to consider qualified applications in the light of the purposes and policy stated in § 101, and that under that standard it may not reject them on the ground that the statute affords too much money or will offend foreign powers or is "not sound policy".

Arco defends the agency's action as producing a "well-balanced fleet" and as having "no negative effect on any of the other objectives" of the act, whether in the domestic or foreign trade. Arco Opp. 16. It likewise asserts that domestic operators are not entitled to be free of competition introduced by the goverment.

In 1985, the agency predicted that the rule—indeed, this was its purpose—would for ten years reduce coast-

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[10] Federal respondents make a revealing addition to the agency's stated reasons, that the costs are "incompatible with federal budgetary limitations." Fed. Opp. 13. The agency did not say this, but if it lay in the background it emphasizes the non-statutory criteria on which the decision rested.

[11] As for the "hugeness" of this sum, it may be contrasted with what the agency pays other subsidized ships. According to data published by the statutory Commission on Merchant Marine and Defense, the average annual subsidy paid for bulk-carrying vessels such as these tankers and for liner vessels is $3.1 million per vessel for both classes. Third Report to Congress 54, 55 (September 1988). The weighted average cargo capacity of the subsidized bulk carriers is approximately 60,000 dwt, and for liners approximately 25,000 dwt, yielding an annual average subsidy cost per cargo carrying unit respectively of $51 and $125. The average size of the VLCCs here in question is 250,000 dwt, which at $5 million yields an average annual subsidy of $20 dwt. Evidently there are economies of scale for subsidy costs as well as for operating costs.

wise freight rates to *nonprofit break-even for the most efficient tonnage. ITOC II*, J.A. 1054, 1072; 50 Fed. Reg. 19170, 19175 (May 7, 1985).

In 1978, the agency analysis provided a further forecast of the rule's financial consequences to the industry on the basis of which the government conceded below that rates are and have been noncompensatory for every class of tonnage. Pet. 16.

It is saying no more than the obvious to suggest that an agency whose function is to foster the development and encourage the maintenance of the merchant marine, § 101, must explain how inflicting a destructive rate structure contributes to realizing that policy. Nowhere is addressed the question of whether the "well-balanced fleet" in the name of which this was done, and which lasted just long enough to achieve the forecast destruction,[12] was a higher aim than the well-being of the whole merchant marine. The error of the court below lay in failing (unlike its proceedings in *ITOC I* and *II*) to require this question to be answered.

Respectfully submitted.

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[12] Pet. 16 and note 10. The BAY RIDGE has also now defaulted and been repossessed by the government, as well as the ADONIS, 80,000 dwt. The Maritime Administration also reports that American-flag movement of Alaskan oil via Panama was down below 200,000 barrels a day the first two months of 1990, one-third of its forecast in the rulemaking.

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American Trading Transportation Co., Inc.,
Cove Maritime Companies, Inc.,
Falcon Carriers, Inc.,
Keystone Shipping Co.,
Sun Transport, Inc.

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